Supreme Court, U.S.
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No. 97-____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BILL JONES, SECRETARY OF STATE OF CALIFORNIA

Petitioner,

v.

BATES, ET AL

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI (OR WRITS OF PROHIBITION AND MANDAMUS)
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI, OR WRITS OF PROHIBITION AND MANDAMUS

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QUESTION PRESENTED

1. Does a state law adopting term limits for state officials violate the First and Fourteenth Amendment of the U.S. Constitution?

2. The second question requires some background to be comprehensible. In a letter brief requested by the Ninth Circuit, the State pointed out that, since a Ninth Circuit decision invalidating term limits would conflict with a prior California Supreme Court decision sustaining the identical term limits against an identical challenge, it would necessitate review in the U.S. Supreme Court to resolve the conflict. In explicit response to this letter brief and imminent conflict, an extraordinary order was issued by a Ninth Circuit panel comprising two judges -- Judges Reinhardt and Fletcher -- who have previously expressed the view (called "remarkable" by this Court and rejected by other courts) that the state and lower federal courts are not coequal and that state supreme courts should be bound by federal circuit court decisions. Their extraordinary order *sua sponte* seeks to round up additional termed-out legislators as intervenors on appeal so that they would be covered by the Ninth Circuit's coming decision rather than the prior decision of the California Supreme Court. The order even goes so far as to invite the inclusion of those former legislators who were *losing parties* in the prior state decision, whom the Ninth Circuit advised should argue they are not longer bound by the state court decision under a "public interest" exception to res judicata.

Does the Ninth Circuit's extraordinary order rounding up additional parties and advising them to argue they are not bound by a prior state decision exceed the proper bounds of the judicial role and the limits of the Circuit's appellate jurisdiction over federal district courts, violate basic notions of federalism and respect for coequal state courts, and effectively usurp from the U.S. Supreme Court the functions of exercising appellate review over state court decisions and resolving conflicts between the state and lower federal courts?

PARTIES TO THE PROCEEDING

The petitioner in this case is Bill Jones, the Secretary of State of California, who was the defendant in the district court and an appellant before the U.S. Court of Appeals for the Ninth Circuit.

The respondents are Tom Bates, Edward H. Lyman, Richard Sterling, Ardis Graham, Richard D. Lewis, Lawrence J. Buchalter, Jonathon Browning, Rachel Sherman, Martha Escutia, Sylvia Hernandez, Ana Rosa Pena, Claudia Navar, Barbara J. Friedman, Susan Zarakov, and Harriet Sculley.

Other parties to the proceedings below are Peter Schabarum and Lewis Uhler, who were Intervenors in the district court and appellants before the U.S. Court of Appeals for the Ninth Circuit.

In addition, Bradley Clark and Conny McCormack, the Registrars of Voters for, respectively, the Counties of Alameda and Los Angeles, were defendants in the district court. But in lieu of Clark and McCormack joining the appeal, all the parties entered stipulations that Clark and McCormack would be bound by whatever judgment was ultimately reached on appeal.

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U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) 6
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Other Authorities:

Ayres, *State Term Limits Are Transforming the Legislatures*,
New York Times at A1, Col. 6 (April 28, 1997) 12-13
Cover & Aleinikoff, *Dialectical Federalism*,
86 YALE L.J. 1035 (1977) 18
Elhauge, *Are Term Limits Undemocratic?*,
64 U. CHIC. L. REV. 83 (1997) 13-14

Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1130 (1986) 18
Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U.L. REV. 759 (1979) 18
TRIBE, AMERICAN CONSTITUTIONAL LAW (1988) 16

PETITION FOR WRIT OF CERTIORARI OR WRITS OF PROHIBITION AND MANDAMUS

Bill Jones, Secretary of State of California, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case, or for writs of prohibition and mandamus.

OPINIONS BELOW

The district court decision invalidating the clauses of the California Constitution that adopt term limits for state legislators (App. 6a-47a) is reported at 958 F.Supp. 1446.[1] The relevant orders of the Court of Appeals (App. 48a-59a) are unreported.

JURISDICTION

On April 23, 1997, the district court declared unconstitutional the clauses of the California Constitution that adopt legislative term limits and enjoined the Secretary of State from enforcing those clauses against the plaintiff legislators. App 46a. The case was appealed to the Ninth Circuit. Petitioner seeks certiorari review before judgment under U.S SUPREME COURT RULE 11 because of, among other things: (1) the enormous uncertainty the district court's judgment is creating for California's electoral system, which requires candidates to file declarations of intent to run in just a few months; (2) the electoral confusion that would result from the imminent conflict between the Ninth Circuit and the California state courts about whether term limits are constitutionally required under the California Constitution or prohibited under the U.S. Constitution; (3) an unprecedented order entered *sua sponte* by the Ninth Circuit that effectively usurps this Court's appellate review of state court decisions and threatens to undermine the res judicata effect of a state supreme court decision; and (4) an electoral calendar that requires a swift, definitive resolution of this issue, which only this Court can provide. This Court has jurisdiction over the petition for certiorari under 28 U.S.C. § 1254(1) and 28 U.S.C. §2101(e).

Petitioner also seeks: (1) a writ of prohibition preventing the

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[1]References to this Petition's Appendix are styled "App. __a." The Transcript is cited as "Tr. __", and the Excerpts of Record as "ER. __."

Ninth Circuit from rounding up additional litigants, so as to prevent it from effectively exercising appellate review of the California Supreme Court and *sua sponte* undermining the res judicata effect of the state court's judgment; and (2) a writ of mandamus directing the Ninth Circuit to decide this case with one week of this Court's order, so as to leave some chance this Court will have sufficient time to exercise its appellate review in time for the next state legislative primaries. This Court has jurisdiction over the petitions for writs of prohibition and mandamus under 28 U.S.C. §1651(a) .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Constitution, Article IV, §§ 1, 1.5, & 2(a), provide:

> Sec. 1. The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.
>
> Sec. 1.5. The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative.
>
> The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent.
>
> To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency

must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served.

Sec. 2. (a) The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years. No Senator may serve more than 2 terms.

The Assembly has a membership of 80 members elected for 2-year terms. No member of the Assembly may serve more than 3 terms.

Their terms shall commence on the first Monday in December next following their election.[2]

U.S. Constitution, Amendment XIV, §1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amendment I, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case involves exigent circumstances created by the election calendar applicable to the June 1998 Primary election, the uncertainty inflicted by a district court judgment that casts doubt on all California legislative races, and the electoral

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[2]The full text of Proposition 140, which adopted term limits not only for legislators, but also the governor and other executive officers is set forth at App. 1a-5a.

confusion that would result from a conflict between the state and federal courts about the constitutionality of California's legislative term limits. In 1991, the California Supreme Court sustained the California Constitution's provisions adopting legislative term limits against a First and Fourteenth Amendment challenge. In 1997, a federal district court invalidated the identical provisions under an identical First and Fourteenth Amendment challenge, a decision that conflicts not only with the California Supreme Court but with every other appellate court to adjudicate the issue. On appeal, a Ninth Circuit panel of Judges Fletcher, Reinhardt and Sneed issued a series of orders. These orders recognized the exigency of the electoral calendar, which requires all California legislative candidates to file declarations of intention to run in the next primaries by February 4, 1998. App. 52a.[3] The Orders also indicated to a reasonable certainty that the Ninth Circuit intends to affirm the district court, thus creating a conflict between the Ninth Circuit and the California Supreme Court that only the U.S. Supreme Court is authorized to resolve. Finally, in a misguided effort to resolve this coming conflict by itself, the Ninth Circuit issued an extraordinary order. This order *sua sponte* invited the addition as intervenors on appeal of any and all legislators, former legislators, and voters. It further advised termed-out candidates who were *parties* to the prior state decision to argue that, for reasons relating to the "public interest" and "the inequitable administration of laws," res judicata did not bind them to the state supreme court's decision. This order exceeds the Ninth Circuit's jurisdiction, constituting the equivalent of appellate review over California Supreme Court decisions. Moreover, even if permissible, the order would not eliminate the imminent conflict, which if allowed to run its course would result in electoral chaos that this Court might not be able

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[3]The 1998 election cycle officially commences with the publication, on December 26, 1997, of petitions to collect signatures-in-lieu-of-filing-fees for candidates intending to run in the June 1998 primary election. CAL. ELEC. CODE §8106.

to resolve in time or would require even more expedited review in the future.

1. The Prior State Court Litigation. In 1990, the California voters adopted a state constitutional provision limiting the terms of their state legislators. This provision states: "No Senator may serve more than 2 terms. . . . No member of the Assembly may serve more than 3 terms." CALIF. CONST. §2(a). Its purpose was to make their legislature more accountable to the electorate and representative of its views by eliminating large seniority advantages that coerce voters to reelect senior legislators, give unfair advantages to career politicians, make elections uncompetitive, and erect entry barriers to desirable challengers from outside the legislature. CALIF. CONST. §1.5.

These term limits were immediately challenged by a coalition of senior legislators and voters from their districts. Their claims that term limits violated the First and Fourteenth Amendments of the U.S. Constitution were adjudicated and rejected by the California Supreme Court in *Legislature v. Eu*, 54 Cal.3d 492, 514-25 (1991), *cert. denied*, 503 U.S. 919 (1992).

2. The District Court's Decision. The same lawyers who brought the state court challenge then decided, using a new group of plaintiffs led by a senior legislator who had helped fund the first litigation, to re-litigate the same question in a new forum: federal district court in the Northern District of California. Given their First and Fourteenth Amendment challenge, the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

After rejecting the State's motions to dismiss and for summary judgment, the district court held a full trial, which consisted mainly of testimony from legislators, voters, and political scientists about the political effects of term limits. On April 23, 1997, the district court declared the provisions of the California Constitution that adopted legislative term limits to be unconstitutional and enjoined the Secretary of State from enforcing them against the plaintiff legislators. App 46a.

This decision created a conflict with *every* court outside of the Ninth Circuit to consider the question of whether state term limits

on state officials violate the First and Fourteenth Amendments. These other decisions have rejected First and Fourteenth Amendment challenges to executive, judicial, and legislative term limits, including the sort of permanent legislative term limits at issue here.[4] Of most immediate concern, it created a conflict with the California Supreme Court's decision in *Legislature v. Eu*, thus raising the prospect that litigants in state court could get injunctions prohibiting the Secretary of State from accepting the candidacies of termed-out candidates while litigants in federal court could get injunctions requiring the Secretary to accept those same candidacies.

Recognizing that its decision "may throw the State's electoral

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[4]*Moore v. McCartney*, 425 U.S. 946 (1976) (dismissing appeal on the ground that such a challenge to executive term limits did not even raise a substantial question); *Maloney v. McCartney*, 223 S.E.2d 607 (1976) (executive term limits); *Maddox v. Fortson*, 172 S.E.2d 595 (Ga. 1970) (executive term limits); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (age limit that prevented voters from retaining judges who exceeded limit); *Nevada Judges Ass'n v. Lau*, 910 P.2d 898 (Nev. 1996) (judicial term limits); *League of Women Voters v. Diamond*, 923 F. Supp. 266 (D. Me.), *aff'd* 82 F.3d 546 (1st Cir. 1996) (consecutive legislative term limits); *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816 (S.D. Ohio 1993), *aff'd on other grounds*, 45 F.3d 126 (6th Cir. 1995) (consecutive legislative term limits); *Roth v. Cuevas*, 603 N.Y.S.2d 962 (Sup. Ct), *aff'd*, 603 N.Y.S.2d 736 (App. Div.), *aff'd*, 624 N.E.2d 689 (N.Y. 1993) (consecutive legislative term limits); *U.S. Term Limits, Inc. v. Hill*, 972 S.W.2d 349, 359-60 (Ark. 1994), *aff'd on other grounds*, 514 U.S. 779 (1995) (permanent legislative term limits); *Legislature v. Eu*, 54 Cal.3d at 514-25 (the same permanent legislative term limits at issue here); *Cawdrey v. Redondo Beach*, 15 Cal. App. 4th 1212, 1228-31 (1993) (permanent legislative term limits); *Dutmer v. City of San Antonio*, 937 F. Supp. 587 (W.D. Tex. 1996) (permanent legislative term limits). *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), is not to the contrary since it declined certiorari on the First and Fourteenth Amendment issues, rested solely on the ground that the Qualifications Clause barred *any* additional qualifications for *federal* legislators, and never considered the relevant First and Fourteenth Amendment doctrines. Indeed, it explicitly disclaimed any intent to raise doubts about term limits (or other qualifications) for state office. *Id.* at 837.

process into confusion," the district court stayed its own judgment pending appeal to the Ninth Circuit. App. 46a. Unfortunately, even stayed, the decision has cast a pall of uncertainty over the upcoming elections since prospective candidates cannot be sure (as long as the issue remains unresolved by this Court) whether they will have to face senior legislators possessing all the advantages the voters intended to eliminate with term limits.

3. The Ninth Circuit Proceedings. Before the State filed a notice of appeal from the judgment, plaintiffs took the unusual procedural step of filing a notice of appeal from the stay of the judgment favoring them. This succeeded in bringing the case before what was known in advance to be that month's motion panel, consisting of Judges Fletcher, Reinhardt, and Fernandez. This panel did not rule on the stay but issued an order granting expedited briefing. App 48a. Judges Fletcher and Reinhardt then remained on the panel to adjudicate the merits. (Under Ninth Circuit practice, a motions panel may, if it wishes, "retain jurisdiction over the merits." *Gregorio T. v. Wilson*, 54 F.3d 599 (9th Cir.1995).) Judge Fernandez did not remain, and was replaced by Senior Judge Sneed. After hearing oral argument on August 6, 1997, this panel issued a series of orders.

Order 1. On August 8, 1997, the panel directed the parties to advise the court of "the time period in which incumbents who may wish to seek reelection to offices that they are barred from holding by Proposition 140 must be advised whether the measure is valid." App. 50a. In a August 12th letter brief, the State responded that, given the exigencies of the electoral calendar, a definitive ruling was necessary by January 26, 1998. App. 52a. The State's letter brief also noted that, given *Legislature v. Eu*, an "affirmance by the Ninth Circuit would not suffice to advise candidates whether the measure is valid." App. 53a. Rather, it would, because California courts do not regard themselves as bound by Ninth Circuit interpretations of the U.S. Constitution:

> "create a conflict between the federal and state courts as to all candidates who are not party to either this litigation or

> *Legislature v. Eu*, a conflict that could only be resolved by a U.S. Supreme Court ruling binding on both the state and federal courts. This is of course one reason it is important to maintain the stay pending all further appellate review."

Id. The Ninth Circuit responded with Order 3, noted below.

Order 2. Following up on oral argument questions by Judges Reinhardt and Fletcher about whether the Measure clearly intended permanent term limits rather than consecutive term limits, the Ninth Circuit issued on order on August 19, 1997, directing the parties to brief the following question:

> "Assuming that Initiative Measure 140, by imposing a lifetime ban on incumbents seeking legislative office, severely limits the voters' right to vote for whomever they choose, is the facial ambiguity of the Measure, as recognized by the California Supreme Court in *Legislature v. Eu*, 816 P.2d 1309, 1315 (Cal. 1991), relevant to its constitutionality?"

App. 54a.[5] The panel's assumption that term limits (permanent or otherwise) severely burden voters' First and Fourteenth Amendment rights conflicts with every decision outside the Ninth Circuit to consider the matter. *See supra* note 4.

Order 3. On September 2, 1997, the Ninth Circuit issued an extraordinary order *sua sponte*. It stated that, in light of the State's letter pointing out that an affirmance would create a conflict between the state and federal courts as to all persons not a party to this litigation or the state litigation, the court invited the addition of other parties as intervenors on appeal. The effect was to assure they would be covered by the coming Ninth Circuit decision rather than the prior decision of the California Supreme

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[5]The State's letter brief responded that: *Legislature v. Eu* had held the surrounding ballot materials clearly resolved any ambiguity in the language, the Ninth Circuit was bound by this state court construction of state law, the language was not ambiguous in the sense of being unclear to voters, and any ambiguity in the Proposition presented to voters was irrelevant to its First and Fourteenth Amendment validity and was in any event cured by the California Supreme Court's clear construction.

Court.

> "The state's letter of August 12, 1997, suggests that uncertainty may exist as to the extent to which the court's decision will be binding with respect to the candidacies of legislators and former legislators who are not parties to this appeal . . . . In light of the state's letter, it appears to the court that additional legislators, former legislators, and voters may file motions to intervene on appeal. . . . A single motion listing the names of all proposed intervenors and a single supporting memorandum is favored."

App. 58a. Not content with this unprecedented effort to judicially round up litigants on appeal to maximize the sweep of its decision, the Ninth Circuit also indicated an intention *sua sponte* to eradicate the res judicata effect of the California Supreme Court's prior decision, advising the plaintiffs to brief:

> "the question whether parties to *Legislature v. Eu*, 54 Cal. 3d 492 (1991), may, notwithstanding their earlier participation in the state proceedings, intervene under the "public interest" exception set forth in, *e.g., Kopp v. Fair Political Practices Comm'n*, 905 P.2d 1248, 1255-57 & n.16 (Cal. 1995); *Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 825 P.2d 438, 441-42 (Cal. 1992), or the "inequitable administration of the laws" exception described in, *e.g., Rutherford v. State*, 233 Cal. Rptr. 781, 789-90 (Cal. App. 4 Dist. 1987)."

App. 58a.

This Order, especially in combination with the prior orders, makes plain that the Ninth Circuit intends to affirm the district court, thus bringing it into conflict with every other circuit and state supreme court to consider the issue. There would be no point in this unprecedented judicial effort to round up additional litigants if the Ninth Circuit intended to reverse, for that would leave no conflict between it and the California Supreme Court. Nor can the Ninth Circuit's declared interest in increasing orderliness and certainty in the election process possibly justify an effort *sua sponte* to undermine what had been understood to be the clear res judicata effect of the prior state court decision on at

least those potential candidates who had been parties to it. Moreover, even if this unprecedented order were permissible, it cannot avoid the imminent conflict (and resulting electoral confusion) because candidates aggrieved from having to run *against* termed-out candidates will still be able to get contrary injunctions in state court.

REASONS FOR GRANTING THE WRIT

U.S SUPREME COURT RULE 11 permits the granting of a writ of certiorari before judgment upon a showing that the case is of "imperative public importance" and "require[s] immediate determination in this Court." Both standards are amply met here.

It is clearly an issue of enormous public importance whether the citizens of California can structure their democratic process in the manner they wish and end what they determined was the perpetual entrenchment of senior legislators. Immediate resolution by this Court is required because of exigent circumstances created by the unique posture of this case. By statute, candidates must file intentions to run in the June 1998 statewide primary election by February 4, 1998. App. 52a. The 1998 election cycle commences officially on December 26, 1997. *See supra* note 3. The district court's decision creates uncertainty that deters potential candidates from running because of the risk they will have to face entrenched incumbents or very senior former legislators. This uncertainty and risk grows worse with each day as the filing deadline approaches. A definitive resolution is necessary for proper planning of political campaigns. The Ninth Circuit cannot assure such a definitive resolution because of the conflicting California Supreme Court decision. *Now is the last clear chance this Court has to take the case in time to assure the definitive resolution necessary to allow California to conduct an orderly election in 1998.* Indeed, as the accompanying motion for expedited consideration shows, there is barely sufficient time to decide the matter in time even on an expedited basis. If the Court does not take the case now, it is likely electoral chaos and dueling injunctions between the state and federal court systems will ensue, necessitating an even more

expedited review by this Court in the future. Nor is the option of applying later for a stay an adequate substitute, for reasons detailed below in section 2(B).

It is also an issue of enormous public importance whether the Ninth Circuit, through its extraordinary order, will be permitted to effectively usurp the power to exercise appellate review over state supreme court decisions and, worse, to undermine *sua sponte* the res judicata effect of state court judgments by rounding up intervenors on appeal who were parties to the state court decision. Such actions -- particularly in a case of such enormous political importance and public scrutiny -- undermine the integrity of the judicial process and are repugnant to the judicial role, which is to decide the cases or controversies presented, not to round up additional litigants to maximize the sweep of its decisions. They also constitute an extreme affront to the dignity of state courts and basic notions of federalism, especially since it is the State's very *Constitution* that is being challenged. Further, it usurps the exclusive power of the U.S. Supreme Court to review state court decisions and settle conflicts between the state courts and lower federal courts. Immediate determination by this Court is necessary to redress these problems.

Nor can these interests fully be vindicated if the Court waits for the Ninth Circuit to issue its judgment. The damage to the integrity and public legitimacy of the judicial process will already have been inflicted. Also, the mere exercise of effective appellate review over state court decisions by the Ninth Circuit (even if eventually reversed by this Court) is an affront to principles of federalism, the dignity of state courts, and this Court's exclusive jurisdiction to settle federal-state court conflicts. Nor would the Ninth Circuit's actions be reviewable here in the off chance the Ninth Circuit reversed the district court. The mere addition of all these intervenors on appeal will also increase electoral confusion, deter challengers, and exhaust weeks of time the electoral process can ill-afford.

1. Whether California Can Have Legislative Term Limits Is a Matter of Imperative Public Importance. California is the largest state in the nation and has the seventh largest economy in the world. Its legislature is enormously important. But the voters of California determined that their legislature was serving them poorly. It had become unrepresentative and unaccountable to the voters because senior legislators enjoyed enormous power and electoral advantages that made elections uncompetitive and discouraged challengers. CALIF. CONST. §1.5. The voters decided that the best way to redress the problem was to amend the California Constitution to adopt term limits.

This is a sovereign decision the citizens of California are entitled to make about the structure of their own state government and the qualifications of for holding elected state office. Moreover, the evidence at trial proved the view of voters was well-founded. This undisputed evidence shows that in California, *before* the enactment of term limits: the mere fact of incumbency gave candidates a 10-16% vote advantage; incumbent re-election rates were 97-100%; and incumbents were rarely opposed in primaries and often unopposed in general elections. Tr. 372-73, 420-21, 541-43, 553; ER 449, 776-79; App. 40a. The undisputed evidence further shows that, *after* the enactment of term limits in California: the incumbent vote advantage plummeted to 4-5%; the reelection rate dropped sharply; the number of challengers increased markedly; and the number of uncontested primaries and elections shrank dramatically. Tr. 107, 372-73; ER 449, 777-79, 781, 783.

The district court concluded this evidence meant only that voters were very happy with their legislators before term limits were enacted. App. 38a-42a. But this conclusion is impossible to square with poll evidence showing voters deeply disliked their legislature, Tr. 120, 693, let alone with the fact that -- in the poll that matters most -- the voters voted for term limits. Nor is it easy to square with the fact that, after term limits, the number of women and minority legislators sharply increased, as did the diversity of legislators' backgrounds. *See* B. Drummond Ayres

Jr., *State Term Limits Are Transforming the Legislatures*, New York Times at A1, Col. 6 (April 28, 1997) (describing 25% increase in women and 300% increase in Hispanic and Asian-American legislators); Tr. 593, ER 785.

Term limits serve three vital functions. *First*, they decrease an inequitable distribution of legislative power across districts by decreasing the maximum seniority advantage some district's legislators can have over others. A district with a newcomer can have at most a four year disadvantage, as compared to the much larger gaps prevailing before term limits. This equalization of legislative power furthers the norms of *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964).

Second, term limits decrease a coercive pressure to vote to re-elect incumbents to preserve each district's legislative clout. Districts who wish to oust their senior incumbents face a collective action problem. *See* Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHIC. L. REV. 83, 85-96, 114-48 (1997). Senior legislators bring more legislative clout to their districts. Any district that ousts its incumbent individually thus suffers a loss of relative legislative clout. This coerces voters to retain incumbents, even if they would otherwise prefer the challenger, in order to maintain relative political influence. The existence of this collective action problem is supported by undisputed record evidence showing that senior legislators have more clout than junior legislators, and also diverge more from their electorate's preferences. Tr. 36, 193-94, 204-07, 212-15, 342-43, ER 998. This deviation is hard to square with the district court's notion that incumbents had a huge electoral advantage only because voters liked them so much, but fits perfectly with the collective action problem noted above. Term limits offer a way for districts to secure more accurate representation without losing relative influence by collectively agreeing to get rid of senior legislators in all districts.[6]

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[6]In this sense, term limits resemble an arms control agreement. The fact

Third, term limits expand the choices on the ballot. Senior legislators enjoy the advantage of having a public platform that has keeps them in the public eye for years and provides them with the equivalent of years of free political advertising. This poses a formidable entry barrier that often deters challengers. Term limits lower this entry barrier by lessening the number of years of essentially free public advertising that incumbents can enjoy. *See* Elhauge, *supra*, at 154-65. The predictable result -- more challengers under term limits.[7]

This entry barrier problem is also well supported by undisputed evidence. As noted above, before term limits incumbents rarely faced challenges in primaries and often not in general elections -- after term limits, challenger entry increased and uncontested primaries and elections plummeted. The undisputed evidence showed also that, before term limits, a challenger had to spend $300,000-400,000 in political advertising to be competitive with an incumbent in the State Assembly, and even more to overcome the incumbent's advantage in the State

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that no individual nation is willing to engage in unilateral disarmament (and lose relative power), does not mean each nation does not suffer from the resulting arms race (that is expensive and does not change relative power), nor that each would not be better off with an arms control agreement that reduces each nation's expense without any change in relative power. Likewise, the fact that no individual district is willing to oust its incumbent (and lose relative power), does not mean each district does not suffer from the effective penalty on ousting senior incumbents (which results in nonrepresentative government without any change in relative power), nor that they would not be better off with term limits that replace all senior incumbents with more representative newcomers without changing relative power in the legislature. The common saying of opponents -- "we already have term limits, they're called elections" -- makes no more sense than saying "we already have an arms control agreement, its called unilateral disarmament."

[7]Thus, a vote for incumbents over the options (or nonoptions) on the ballot without term limits, does not mean voters do not prefer the more desirable options added to the ballot with term limits and lower entry barriers.

Senate. Tr. 417-18. Obviously such a high entry cost discourages many candidates from entering the race at all. The undisputed evidence also showed that these entry barriers did in fact discourage many candidates from running. Tr. 47-51, 168-69, 231, 520-21, 524-25; 552, 564-65; ER 779-80, 966-67.

Allowing the voters of California to exercise their prerogative to redress political problems through term limits is a matter of manifest public importance. Indeed, correcting these problems *reduces* the burden on voting rights under the "reasonable, nondiscriminatory" test of *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Term limits *reduce* a discriminatory feature of the old regime (by equalizing legislative power across districts) and *lessen* burdens on voter choice by alleviating the penalty on voting against senior legislators and increasing the range of choices on the ballot through a lowering of entry barriers.

The district court mistakenly concluded that term limits failed the *Burdick* test for two reasons: (1) the term limits discriminate against the class of voters who prefer to vote for experienced legislators; and (2) the burden is unreasonable because voters are permanently barred from voting for experienced legislators. App. 29a-31a. But this sort of misguided logic would not only condemn all term limits laws but virtually all qualifications for state office (e.g., age, residency, nonfelon, or even citizenship), for all could be said to "discriminate" against the class of voters who prefer to vote for candidates lacking the qualification and to do so permanently. This turns on its head this Court's cases, which -- recognizing the important Tenth Amendment interests at stake -- require special deference to (not hostility against) state qualifications for state officials. *See Gregory*, 501 U.S. at 460-63; *Sugarman v. Dougall*, 413 U.S. 534, 637-38 (1973); *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1889). This misguided logic is also flatly inconsistent with this Court's First and Fourteenth Amendment jurisprudence, which clearly holds that bans on particular candidates running are unproblematic as long as they do not amount to bans on candidates having a distinctive political viewpoint. *Timmons v. Twin Cities Area New Party*, 117 S.Ct.

1364, 1369-70 (1997); *Burdick*, 504 at 433, 438-440 & n.10; *Anderson v. Celebrezze*, 460 U.S. 780, 788 & n.9, 793 n.15 (1983); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1097 & nn.1-2 (1988). Term limits constitute no such ban; they promote access, not a particular ideology. Moreover, the *Burdick* doctrine's rationale is that the lawmakers regulating the election process might be biased by their desire to entrench themselves in office. *Id.* at 1097. Without this potential bias, there is no reason to think the judicial process can make better decisions than the political process. But entrenchment is the last thing term limits do, and it is a perversion of the *Burdick* doctrine to use it, not to prevent legislators from entrenching themselves, but to help legislators maintain their entrenchment.

2. Exigent Circumstances Require Immediate Resolution of the Term Limits Issue by this Court. *A. The Need for a Swift and Definitive Resolution, which the Ninth Circuit Cannot Assure.* The district court's judgment has cast a pall of uncertainty over all legislative races in California. No one knows for sure whether termed-out legislators will be able to run in 1998. Such uncertainty is fatal to political campaigns. Candidates must decide now whether to run. They must lay their plans to recruit campaign volunteers, raise funds, and hire campaign staff. They cannot do so while the validity of term limits remains in suspension. The chilling effect falls with particular severity on precisely those candidates the voters enacting term limits were concerned about -- challengers who would be deterred from running by the prospect of running against a senior legislator with all their electoral advantages. *See* CALIF. CONST. §1.5; *supra* p.14. Even those prospective challengers who choose to proceed heedless of the uncertainty will be adversely affected in their efforts to attract support. Contributors will be less likely to commit funds if they think a court may allow senior legislators to enter the race, and workers or volunteers may be reluctant to commit effort for the same reason. Every day this uncertainty continues, and the closer it gets to the February 4th deadline for filing declarations of

intention to run, the greater the adverse effects of this uncertainty. The electoral process urgently needs a quick and definitive resolution of who will be permitted to run in the next primary.

The Ninth Circuit cannot assure such a definitive resolution. For if it affirms, the result will be open conflict with the California Supreme Court. On questions of federal law, the state courts and the lower federal courts are co-equal. *Atlantic C.L.R. Co. v. Engineers*, 398 U.S. 281, 286 (1970). Accordingly, it is well-accepted (outside the Ninth Circuit) that state courts are not bound by lower federal appellate court decisions on federal questions. [8] We belabor this obvious point with more citations

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[8] *Lockhart v. Fretwell*, 506 U.S. 364, 375-376 (1993) (Thomas, J., concurring); *Steffel v. Thompson*, 415 U.S. 452, 482 n. 3 (1974) (Rehnquist, J., joined by Burger, C.J., concurring); *Perez v. Ledesma*, 401 U.S. 82, 125 (1971) (Brennan, J., joined by White and Marshall, JJ., dissenting); *Owsley v. Peyton*, 352 F.2d 804, 805 (4th Cir.1965); *United States ex rel Reis v. Wainwright*, 525 F.2d 1269, 1272 n.11 (5th Cir.1976); *Smith v. Wisconsin Dep't of Agriculture*, 23 F.3d 1134, 1139 n.10 (7th Cir.1994); *Bromley v. Crisp*, 561 F.2d 1351, 1354 (10th Cir.1977); *Speedco, Inc. v. Estes*, 853 F.2d 909, 914 (Fed.Cir.1988); *In re F.P.*, 843 P.2d 1214, 1215 n.1 (Alaska 1992); *State v. Gates*, 118 Ariz. 357, 359 (1978); *People v. Barber*, 799 P.2d 936, 940 (Colo.1990); *Donald & Co. Securities v. Mid-Florida Community Services*, 620 So.2d 192, 193 (Fla. 2d Dist. Ct. App. 1993); *Felker v. State*, 252 Ga. 351, 361 (1984); *State v. Sanders*, 648 So.2d 1272, 1279 (La.1994); *Littlefield v. State Dep't of Human Servs.*, 480 A.2d 731, 737 (Me.1984); *Gayety Books v. Mayor of Baltimore*, 279 Md. 206, 213 (1977); *Blanton v. North Las Vegas Mun. Ct.*, 103 Nev. 623, 633 (1987), *aff'd*, 489 U.S. 538 (1989); *State v. Coleman*, 46 N.J. 16, 36-37 (1965) (collecting authority from the state courts of California, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Missouri, Pennsylvania, New York, and Washington); *State v. McDowell*, 310 N.C. 61, 74 (1984); *State v. Glover*, 60 Ohio App.2d 283, 287 (1978); *Brown v. State*, 933 P.2d 316, 323-34 (Okl. Cr.1997); *Van De Hey v. U.S. National Bank*, 313 Or. 86, 95 n.9 (1992); *State v. McKay*, 680 S.W.2d 447, 450 (Tenn.1984); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex.1993); *State v. Austin*, 685 A.2d 1076, 1079-80 (Vt. 1996); *Cook v. Lilly*, 158 W.Va. 99, 101 (1974); *State v. Webster*, 114 Wis.2d 418, 426 n. 4 (1983); *First Wyoming Bank v. Transmountain Sales*,

than should be necessary because two of the Judges on the panel below -- Judges Reinhardt and Fletcher -- have expressed the contrary view in dicta, arguing that state courts should regard themselves as bound by the appellate decisions of lower federal courts. *Yniguez v. Arizona*, 939 F.2d 727, 736-37 (9th Cir.1991) (opinion by Reinhardt, J., joined by Judges Fletcher and Tang), *vacated and remanded*, 117 S.Ct. 1055 (1997). *See also Bland v. Fessler*, 88 F.3d 729, 738 (9th Cir. 1996) (opinion by Fletcher, J.) (reiterating this view). This Court had no occasion to rule on this dicta when it reviewed this decision, but it did call the Reinhardt-Fletcher view "remarkable" and cited contrary authority. *See Arizonans For Official English v. Arizona*, 117 S. Ct. 1055, 1064 n.11 (1997). While the Reinhardt-Fletcher view helps explain the Ninth Circuit's extraordinary order asserting the equivalent of appellate review over the California Supreme Court, *see infra* §3, it clearly violates the fundamental federalist principle that state courts are coordinate and coequal with the lower federal appellate courts on matters of federal law. And, like its apparent view about the constitutionality of term limits on state officials, it conflicts with every other federal circuit and state court to consider the question. *See supra* note 8.[9]

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602 P.2d 1219, 1225 (Wyo.1979); Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1130, 1231 n.495 (1986); Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U.L. REV. 759, 771 (1979); Cover & Aleinikoff, *Dialectical Federalism*, 86 YALE L.J. 1035, 1053 (1977). *See also ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("state courts . . . possess the authority . . . to render binding judicial decisions that rest on their own interpretations of federal law").

[9] Ninth Circuit cited only two cases, 939 F.2d at 736 n.9, for its remarkable view: *Handy v. Goodyear Tire*, 230 Ala. 211 (1935), and *Kuchenmeister v. Los Angeles & S.L.R.*, 172 P. 725, 727 (Utah 1918). But neither held it was bound to follow a lower federal court decision even if its own state court decisions were to the contrary. And subsequent cases in both states make clear that they adhere to the universal rule that state courts are not bound by federal appellate decisions. *Preferred Risk Mut. Ins. v. Ryan*, 589 So.2d 165, 167 n.2 (Ala.1991); *State v. Perank*, 858 P.2d 927, 941 (Utah 1992)

In any event, even if the Reinhardt-Fletcher view were correct, it would not avoid the imminent conflict and electoral chaos that would result from a Ninth Circuit decision invalidating California's term limits. This is because the California courts have repeatedly held that they do not regard themselves as bound by Ninth Circuit interpretations of the U.S. Constitution. *See, e.g., People v. Williams*, 66 Cal. Rptr.2d 123, 149 (1997); *People v. Bradford*, 15 Cal.4th 1229, 1292 (1997); *People v. Memro* 11 Cal.4th 786, 882 (1995); *People v. Crittenden*, 9 Cal. 4th 83, 120 n.3 (1994); *Raven v. Deukmejian*, 52 Cal. 3d 336, 352 (1990). Obviously, this would also include any Ninth Circuit interpretation that the Supremacy Clause compels state courts to follow federal appellate authority. Thus, no matter what the Ninth Circuit asserts, the practical consequence remains that, if the Secretary of State did not enforce California's term limits, any aggrieved litigant would be able to go into state court and get an injunction compelling him to do so, citing *Legislature v. Eu*.

A Ninth Circuit decision invalidating California's term limits would thus put the Secretary of State in an impossible situation. If the Secretary were to respond by certifying the candidacies of termed-out candidates, aggrieved opponents could seek an injunction against the Secretary in state court. If the Secretary were to decline to certify the candidacies of such termed-out candidates, such barred candidates could (even if not joined in this case) seek an injunction against the Secretary in federal court. No matter which course the Secretary took, his conduct would be vulnerable to injunction. Worse yet, he would be in violation of his constitutional duties in the eyes of either the state or federal courts. This is obviously an intolerable situation for the electoral system and for a government official who takes seriously his oaths to uphold both the U.S. and California Constitutions. And

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(declining to follow Tenth Circuit on identical federal question); *id.* at 955-56 & nn.2-3 (Zimmerman, J., dissenting) (interpreting *Kuchenmeister* as a case about comity, and dissenting on those grounds, but recognizing that Utah was not bound to follow federal appellate decisions).

it would result in electoral confusion that makes it makes it all the harder for potential candidates to decide whether to run and to organize their political campaigns.

The Ninth Circuit no doubt wished to avoid this conflict and electoral chaos when it issued its unprecedented order seeking to add any termed-out candidates as intervenors on appeal. But that order is, as discussed below, clearly impermissible since it seeks to eliminate the conflict by exercising the equivalent of appellate review over the California Supreme Court. Moreover, even if the order were permissible, it would not avoid the imminent conflict and electoral confusion for two reasons. First, it can hardly be assured that all termed-out candidates will actually choose to intervene. Joining a lawsuit to invalidate the voters' wish to have term limits is politically risky, as term limits enjoy considerable support among voters. Second, even if all such candidates were joined, the Ninth Circuit decision still could not bind candidates who are not termed-out but would be aggrieved by running against otherwise termed-out candidates. Those candidates would still be able to get an injunction in state court compelling the Secretary of State to enforce the term limits mandated by the California Constitution. The Secretary of State would then be faced with conflicting decisions, each of which would be binding upon him, but both of which obviously cannot be followed.

Normally, it would be worth waiting for a Ninth Circuit decision, on the off chance it might reverse the district court and thus restore uniformity on this issue in the lower courts. For the reasons noted above, however, it appears virtually certain the Ninth Circuit will affirm, thus making review in the Supreme Court unavoidable. Even the risk of affirmance, moreover, fosters confusion and uncertainty calculated to disrupt the electoral process. The close proximity of candidate filing deadlines compounds the problem and underscores the need to move the issue to this Court, which can uniquely assure a swift, definitive decision.

B. The Inadequacy of Waiting to Apply for a Stay. It is not an adequate alternative to wait until later to apply for a stay.

First, even with a stay in place, the district court's judgment presently casts an cloud of uncertainty over California's elections. The stay, which may after all be lifted at any moment, is no more than a temporary shelter against the glowering storm of the district court's judgment. While some challengers would certainly benefit from a stay, others may prove unable to run, organize campaigns, raise funds, hire campaign workers, or find volunteers, when they do not know who they will be running against. This, and the looming prospect of having to face entrenched incumbents or senior former legislators, is likely to deter many potential candidates from organizing campaigns at all. These ill-effects may be irreversible later and cannot be eradicated as long as the election is carried forward courtesy of a stay, whether issued by the district court, the Ninth Circuit, or indeed this Court itself. There is in fact a substantial possibility that election-by-stay will achieve a result no one wishes: termed out incumbents will be barred from running at the same time that challengers are deterred by the attendant uncertainty. While certainly preferable to no stay at all, election by stay is a distant second choice to the expeditious resolution of the case.

Second, while the State strongly believes that term limits do not violate plaintiffs' constitutional rights and that there is no substantial likelihood this Court would find otherwise, it is nonetheless true that, if those rights *were* being violated, they could not be vindicated with a stay. Left to the stay stage, the conflict between the state and federal systems would leave this Court no real choice but to grant a stay to avoid electoral chaos, and that stay would necessarily come at the expense of whatever rights plaintiffs claim to have to run for office. While such a stay would certainly be desirable and necessary if things reached that stage, an expedited decision by this Court would be far preferable since it could simultaneously avoid this conflict and make sure that whichever side is right on the constitutional law has its interests vindicated in time for the next election. Deferring the decision till later would either result in an even more compressed schedule than suggested in the accompanying motion to expedite,

or would make such expedited review practically impossible given the shortness of time.

Third, the possible *availability* of a future Supreme Court stay (in the event of an adverse Ninth Circuit decision that lifts the current stay) would not avoid massive electoral confusion likely to ensue while stay papers are drafted and adjudicated. Expectations will be created, campaigns organized or disbanded, and money raised and expended. Litigation will likely be launched on all sides. The uncertainty and cost, coupled with the prospect of having to face senior incumbents or former legislators, will frighten off many potential challengers -- precisely the effect that California's term limits are intended to avoid. CALIF. CONST. §1.5. The question of who can run for state legislative office is simply too important to subject to such a period of uncertainty, especially so close the deadline for declaring candidacies.

Fourth, staying a Ninth Circuit affirmance would not prevent any termed-out candidates who did *not* join this litigation from going into federal court to enjoin the Secretary from enforcing term limits against them. Each of those separate injunctions would then have to be separately stayed, with the attendant uncertainty and massive litigation expense.

Fifth, with or without a stay, the Secretary of State would be in an impossible position. By complying with the constitutional rulings of one court, he will necessarily be in violation of the rulings made by the other. That is an intolerable situation for an officer sworn to uphold both the state and federal constitutions; and it impairs the integrity of the rule of law in the eyes of the public.

Sixth, leaving matters to the stay stage would effectively mean that an enormously important issue -- the identity of candidates in legislative races throughout California in 1998 -- would be left to a truncated stay proceeding. Even for one election cycle, this is simply too important an issue to leave to such a truncated proceeding. Normally, a stay merely preserves a legal status quo. While this principle certainly favors maintaining term limits, it is

impossible to make a decision that fully maintains the status quo because no matter how a stay application would be decided, some new set of candidates would become legislators. Those legislators would enact many new laws during terms of 2-4 years. The identity of their lawmakers for the next 2-4 years is simply too important an issue for California to leave only to a truncated stay proceeding.

Finally, inherent in any stay decision is the prospect that the issue might later be decided differently after full briefing. No matter how this Court decides the stay issue, a later decision reaching the opposite conclusion on the merits would cast doubt on the political legitimacy of the legislators who were elected under the tentative regime.

A stay cannot solve these problems, nor can such Rube Goldberg devices as judicial orders seeking to round up additional litigants. The simple and clean solution is for this Court to hear the case now, on an expedited basis. The State recognizes that the granting of certiorari before judgment by a federal appellate court is rarely appropriate. If there were more time and no imminent conflict, it would be better to await the Ninth Circuit decision. But these timing and conflict concerns are so serious that the State is prepared to forgo the "two bites at the apple" it could obtain by exhausting the avenues of Ninth Circuit review before petitioning to this Court. The People of California simply need as soon as possible a definitive answer as to who will be running in the next election. And only this Court can provide such a definitive answer. Every day of delay simply increases the costs and problems of electoral uncertainty.

3. The Ninth Circuit's Unprecedented Order Inviting Intervention Usurps This Court's Exclusive Appellate Jurisdiction Over State Courts. The Ninth Circuit's unprecedented order seeking to round up additional litigants acknowledged that it was a direct response to the State's letter brief pointing out that an affirmance would create a conflict with the California Supreme Court necessitating review in this Court. There can thus be no doubt that the intent of its order was to

eliminate the conflict by itself, without awaiting review in this Court, by considering whether to make the state court decision nonbinding on every termed-out candidate, even those who were *parties* to the state court litigation. This the Ninth Circuit cannot do. As this Court has pointed out, "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Atlantic*, 398 U.S. at 296. The authority of the lower federal appellate courts is limited to exercising appellate jurisdiction over the federal district courts. By rounding up additional litigants, including any who wish to be freed from the California Supreme Court's ruling, the Ninth Circuit purports to set itself up as the authority over whether the state court decision will continue to have any effect.

Even if the Ninth Circuit ultimately did not use this authority to effectively reverse the California Supreme Court, the Order itself involves an improper assertion of appellate jurisdiction over the California Supreme Court, and an affront to our federalist court system and the sovereign dignity of the California judicial system. In the unlikely event the Ninth Circuit decided to sustain term limits, such a decision would differ little from a decision to affirm the California Supreme Court. And in the even more unlikely event the Ninth Circuit later decided not to admit the intervenors it has invited, its unprecedented order would be the equivalent of an assertion of certiorari jurisdiction over the state courts, that would simply be followed by the equivalent of a denial of certiorari in the case at hand.

The mere assertion of such authority by a federal appellate court usurps the exclusive power of this Court to decide whether to grant certiorari to review state court decisions and, if granted, whether to affirm or reverse those state court decisions.

> "Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify [a state court's] judgment for errors [on U.S. Constitutional law]. To do so would be an exercise of appellate jurisdiction."

Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 (1923). This

Court has already considered a petition for certiorari from the California Supreme Court's decision, and has denied it. 503 U.S. 919 (1992). For the Ninth Circuit to proceed as it plans is to effectively assert a power to second-guess the wisdom of this Court's decision to deny certiorari in that case. Even if the Ninth Circuit did not decide to grant such certiorari, the mere assertion of such a power in a lower federal court cannot be tolerated.

> "While the lower federal courts were given certain powers in the 1789 Act, they were not given *any* power to review directly cases from state courts, and they have not been given such powers since that time. *Only* the Supreme Court was authorized to review on direct appeal the decisions of state courts. Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system."

Atlantic, 398 U.S. at 286 (emphasis added).

The Ninth Circuit's order seems explicable only by the Reinhardt-Fletcher view that federal circuit court decisions should bind state supreme courts. But, like the Ninth Circuit's apparent view that state term limits are unconstitutional, this view also raises a conflict with every other circuit and state court that itself merits review in this Court. *See supra* note 8. This conflict should be reviewed now, especially since it would not be subject to review later if the Ninth Circuit reverses the district court. Nor is it any answer to say that the Ninth Circuit is acting to avoid conflicts and friction between the state and federal courts. *See Yniguez*, 939 F.2d at 736 (arguing that the avoidance of such friction supports the Reinhardt-Fletcher view). In adopting a federalist court system that conferred coequal power on state and lower federal courts it was understood that "this dual court system was bound to lead to conflicts and frictions." *Atlantic*, 398 U.S. at 286. This does not mean the lower federal courts should try to resolve those conflicts and friction by overriding state courts, any more than it means state courts with the same aim should try to override federal courts. After all, conflict and

friction between the coequal federal *circuits* is also inevitable, but this does not mean one circuit is entitled to take it upon itself to resolve that conflict and friction by exercising review over the other circuits. Rather, the exclusive forum for resolving state-federal or circuit-circuit conflicts is to seek review in this Court.

> "Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. . . . Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court."

Id. The Ninth Circuit's unprecedented order involves just such a fight for control with a state court system, and usurps this Court's exclusive jurisdiction to resolve such conflicts.

Indeed, the Ninth Circuit asserts a power greater than that of the Supreme Court of the United States, for even this Court cannot retroactively undo the res judicata effect of state court decisions years after all appeals from that decision have been exhausted. Nor can this or any other federal court go beyond the case or controversy before them by soliciting the addition of more parties and advising them what to argue before the court. "Article III, §2, of the Constitution confines federal courts to the decision of 'Cases' or 'Controversies.'" *Arizonans For Official English*, 117 S.Ct. at 1067. Courts are supposed to resolve the cases or controversies brought before them, not to seek out new ones, or extend the ones already before them, by rounding up additional parties.

Even the vehicle employed by the Ninth Circuit to attain its end -- the *sua sponte* addition of intervenors on appeal -- is alone unlawful. Other than within 30 days of a petition to review an administrative agency, FED. R. APP. PROC. 15(d), the Federal Rules do not authorize intervention on appeal. Thus, in cases not involving agency review, courts have allowed intervention on appeal only in "exceptional" circumstances that excuse the

intervenors' failure to enter the case earlier.[10] No such exceptional circumstances are present here. And we have found *no* case where the appellate court *sua sponte* invited intervention on appeal, other than one case where the appellate court was correcting the district court's failure to comply with a statute requiring notification of the United States when the constitutionality of a federal statute was questioned. *Thatcher v. Tennessee Gas Trans.*, 180 F.2d 644, 648 n.7 (5th Cir.1950).

The Order also exceeds the proper bounds of the judicial role. Having federal courts in effect solicit clients and advise them what to argue before the court is simply too great a spectacle to tolerate. It compromises the integrity of the judicial system. Judges are not supposed to act as lawyers or strategists for some parties, let alone for persons who would not be parties but for a judicial invitation. It also deviates from our normal understanding of the adversary process -- where parties enter a case with the understanding that they are taking the risk of either losing or winning before that court -- for a court to sign up additional parties to a no-lose proposition once the court has clearly indicated which way it intends to rule.

Correcting these affronts to the integrity of the judicial process and the proper limits of the court's appellate jurisdiction are -- especially in a case of such enormous political importance and public scrutiny -- a matter of imperative public importance that requires immediate determination by this Court. In addition, irreparable harm to the electoral process would result if the Court waits until the Ninth Circuit issues its judgment. The addition as parties of the slew of senior former incumbents that the Ninth

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[10] *Amalgamated Transit Union v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir.1985); *In re Grand Jury Investigation*, 587 F.2d 598, 601 (3rd Cir.1978); *Spring Construction. v. Harris*, 614 F.2d 374, 377 fn. 1 (4th Cir. 1980); *McKenna v. Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir.1962); *Landreth Timber v. Landreth*, 731 F.2d 1348, 1353 (9th Cir.1984), *rev'd on other grounds*, 471 U.S. 681 (1985); *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir.1997).

Circuit seeks to add will only increase the confusion and uncertainty to the electoral process that already attend this litigation. It will also deter many challengers -- again, the very effect term limits seek to avoid. It will also disrupt expectations, campaigns, and fund raising.

Moreover, the Ninth Circuit's unprecedented effort to round up additional litigants at this late date will exhaust weeks of time. The briefing schedule on additional intervenors alone runs three weeks. *See* App 58a. Unless the Ninth Circuit has improperly pre-judged the matter, reviewing these briefs will require some time. And if the intervention is not to be a sham, these intervenors must be given some opportunity to be heard before the Ninth Circuit. Further, to assure that these new parties have the requisite standing, testimony would have to be taken (as it was in the trial court) testing whether the added candidate-plaintiffs really intend to run for office and whether the added voter-plaintiffs really intend to vote for them. The California electoral system can ill-afford this additional delay and extended uncertainty given the inexorable march of the electoral calendar.

4. Writs of Prohibition and Mandamus Are Warranted. Petitioner also requests writs of prohibition and mandamus forbidding the Ninth Circuit from adding intervenors on appeal and directing the Ninth Circuit to decide this case within one week of this Court's order. The granting of such writs satisfy all the criteria of U.S. SUPREME COURT RULE 20(1).

(a) Granting such writs would be in aid of the Court's appellate jurisdiction. Indeed, beyond aiding the Court's appellate jurisdiction to correct lower court errors, the writ here would help preserve that appellate jurisdiction for two reasons. First, the writs would prevent the Ninth Circuit from effectively usurping this Court's power to exercise appellate review over state supreme Courts. Second, the writs permit the U.S. Supreme Court sufficient time to exercise its appellate review in time for the filing deadline for the next state legislative primaries. Protecting the appellate jurisdiction of the U.S. Supreme Court is a traditional function of the writs. *See, e.g., Ex parte United*

States, 287 U.S. 241, 245-46 (1932).

Another traditional function of the writs is preventing a lower court from exceeding its jurisdiction. *See Will v. United States*, 389 U.S. 90, 95 (1967). In so doing,"the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction.'" *Id.* Rather, the "writ is appropriately issued . . . when there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). It is thus appropriate to issue the writ here to prevent the Ninth Circuit from circumventing the normal limits on its appellate jurisdiction -- and usurping this Court's exclusive appellate review of state courts -- through the end run of rounding up litigants and offering to free them from a state court decision.

(b) The exceptional nature of the Ninth Circuit's order, the looming conflict with the California Supreme Court, and the inexorable march of the legislative election calendar warrant the exercise of this Court's discretionary power to grant such a writ.

(c) Adequate relief cannot be obtained in any other form or from any other court since only this Court has authority to keep the Ninth Circuit within its jurisdictional bounds and to settle conflicts between the state courts and lower federal courts. Nor is it an adequate substitute to wait for ordinary review after a final judgment is rendered, for the exercise of appellate review over state court decisions by the Ninth Circuit is itself a wrong even if later reversed, *see supra* §3, and unless this Court acts to assure itself an opportunity to review the case now, it will not have an opportunity to provide a definitive resolution before the deadline for the next state elections.

This case fits comfortably within the bounds set by precedent. *Will*, 389 U.S. at 95 (writ appropriate if it is "the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations"); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 203-04 (1945) (writ appropriate where district court, by failing to dismiss a complaint, was alleged to be exercising jurisdiction in conflict with a federal agency); *id.* at 204 (writ appropriate to review lower court actions "alleged to

be in excess of their authority, by which they have foreclosed the adjudication of rights or the protection of interests committed to the jurisdiction of a state officer or tribunal"); *Ex parte Peru*, 318 U.S. 578, 586 (1943) (entitled to writ where district court's allegedly improper exercise of jurisdiction infringed on the "dignity and rights of a friendly sovereign state"); *Maryland v. Soper*, 270 U.S. 9, 29-30 (1926) (State entitled to writ to review claim lower court was interfering with jurisdiction of state courts); *In re Skinner & Eddy Corp.*, 265 U.S. 86, 96 (1924) (entitled to writ where lower court exercise of jurisdiction interfered with right to pursue claim in state court); *De Beers Consolidated Mines v. United States*, 325 U.S. 212, 217 (1945) (writ appropriate where lower court allegedly had no authority to preliminarily enjoin party from taking money out of country). A writ is especially appropriate, where, as here, no prior case ever authorized the lower court's action. *Schlagenhauf*, 379 U.S. at 110 (allowing writ because of paucity of authority for lower court power to order examination of a party).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. If certiorari is denied or cannot immediately be granted, the State requests (in the alternative or the interim) the issuance of writs of prohibition and mandamus directed at the Ninth Circuit and Judges Fletcher, Reinhardt, and Sneed, forbidding them from adding intervenors on appeal and directing the Ninth Circuit to decide this case with one week of this Court's order.

Respectfully submitted.

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September 11, 1997

APPENDIX A

PROPOSITION 140: TEXT OF PROPOSED LAW

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure expressly amends the Constitution by amending and combining sections thereof; therefore, new provisions proposed to be inserted or added are printed in *italic type* to indicate they are new.

PROPOSED LAW

Section 1. This measure shall be known and may be cited as "The Political Reform Act of 1990."

Section 2. Section 1.5 is added to Article IV of the California Constitution, to read:

SEC 1.5. The people find and declare that the Founding Fathers established system of representative government based upon free, fair and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive and less representative.

The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are elected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. these career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent.

To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the

people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served.

SEC. 3. Section 2 of Article IV of the California Constitution is amended to read:

SEC. 2. (a) The Senate has a membership of 40 Senators elected for 4-year terms, 2 to begin every 2 years. *No Senator may serve more than 2 terms.* The Assembly has a membership of 80 members elected for 2-year terms. *No member of the Assembly may serve more than 3 terms.* Their terms shall commence on the first Monday in December next following their election.

(b) Election of members of the Assembly shall be on the first Tuesday after the first Monday in November of even-numbered years unless otherwise described by the Legislature. Senators shall be elected at the same time and _____ as members of the Assembly.

(c) A person is ineligible to be a member of the Legislature unless the person is an elector and has been a resident of the legislative district for one year, and a citizen of the United States and a resident of California for 3 years, immediately preceding the election.

(d) When a vacancy occurs in the Legislature, the Governor immediately shall hold an election to fill the vacancy.

SEC. 4. Section 4.5 is added to Article IV of the California Constitution, to read:

SEC. 4.5. Notwithstanding any other provision of this Constitution or existing law, a person elected to or serving in the Legislature on or after November 1, 1990, shall participate in the Federal Social Security (Retirement, Disability, Health Insurance) Program and the State shall pay only the employer's share of the contribution necessary to such participation. No other pension or retirement benefit shall accrue as a result of

service in the Legislature, such service not being intended as a career occupation. This Section shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have accrued under an existing law to a person holding or having held office in the Legislature, but upon adoption of this Act no further entitlement to nor vesting in any existing program shall accrue to any such person, other than Social Security to the extent herein provided.

SEC. 5. Section 7.5 is added to Article IV of the California Constitution to read:

SEC. 7.5. In the fiscal year immediately following the adoption of this Act, the total aggregate expenditures of the Legislature for the compensation of members and employees of, and the operating expenses and equipment for, the Legislature may not exceed an amount equal to nine hundred fifty thousand dollars ($950,000) per member for that fiscal year or 80 percent of the amount of money expended for those purposes in the preceding fiscal year, whichever is less. For each fiscal year thereafter, the total aggregate expenditures may not exceed an amount equal to that expended for those purposes in the preceding fiscal year, adjusted and compounded by an amount equal to the percentage increase in the appropriations limit for the state established pursuant to Article XIII B.

SEC. 6. Section 2 of Article V of the California Constitution is amended to read:

SEC. 2. The Governor shall be elected every fourth year at the same time and places as members of the Assembly and hold office from the Monday after January 1 following the election until a successor qualifies. The Governor shall be an elector who has been a citizen of the United States and a resident of this State for 5 years immediately preceding the Governor's election. The Governor may hot hold other public office. *No Governor may serve more than 2 terms.*

SEC. 7. Section 11 of Article V of the California Constitution is amended to read:

SEC. 11. The Lieutenant Governor, Attorney General, Controller, Secretary of State, and Treasurer shall be elected at the same time and places and for the same term as the Governor. *No Lieutenant Governor, Attorney General, Controller, Secretary of State, or Treasurer may serve in the same office for more than 2 terms.*

SEC. 8. Section 2 of Article IX of the California Constitution is amended to read:

SEC. 2. A Superintendent of Public Instruction shall be elected by the qualified electors of the State at each gubernatorial election. The Superintendent of Public Instruction shall enter upon the duties of the office on the first Monday after the first day of January next succeeding each gubernatorial election. *No Superintendent of Public Instruction may serve more than 2 terms.*

SEC. 9. Section 17 of Article XIII of the California Constitution is amended to read:

SEC. 17. The Board of Equalization consists of 5 voting members: the Controller and 4 members elected for 4-year terms at gubernatorial elections. The state shall be divided into four Board of Equalization districts with the voters of each district electing one member. *No member may serve more than 2 terms.*

SEC. 10. Section 7 is added to Article XX of the California Constitution to read:

SEC. 7. The limitations on the number of terms prescribed by Section 2 of Article IV, Sections 2 and 11 of Article V, Section 2 of Article IX, and Section 17 of Article XIII apply on to terms to which persons are elected or appointed on or after November 6, 1990, except that an incumbent Senator whose office is not on the ballot for general election on that date may serve only one additional term. Those limitations shall not apply to any

unexpired term to which a person is elected or appointed if the remainder of the term is less than half of the full term.

SEC. 11. Section 11 (d) is added to Article VII of the California Constitution to read:

SEC. 11. (a) The Legislator's Retirement System shall not pay any unmodified retirement allowance or its actuarial equivalent to any person who on or after January 1, 1987, entered for the first time any state office for which membership in the Legislator's Retirement System was elective or to any beneficiary or survivor of such a person, which exceeds the higher of (1) the salary receivable by the person currently serving in the office in which the retired person served, or (2) the highest salary that was received by the retired person while serving in that office.

(b) The Judges' Retirement System shall not pay any unmodified retirement allowance or its actuarial equivalent to any person who on or after January 1, entered for the first time any judicial office subject to the Judges' Retirement System or to any beneficiary or survivor of such a person, which exceeds the higher of (1) the salary receivable by the person currently serving in the judicial office in which the retired person served or (2) the highest salary that was received by the retired person while serving in that judicial office.

(c) The Legislature may define the terms used in this section.

(d) If any part of this measure or the application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications which reasonably can be given effect without the invalid provision or application.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TOM BATES; EDWARD H. LYMAN; RICHARD STERLING; ARDIS GRAHAM; RICHARD D. LEWIS; LAWRENCE J. BUCHALTER; JONATHAN BROWNING; RACHEL SHERMAN; MARTHA M. ESCUTIA; SYLVIA HERNANDEZ; ANA ROSA PENA; CLAUDIA NAVAR; BARBARA J. FRIEDMAN; SUSAN ZARAKOV; and HARRIET SCULLEY,

Plaintiffs,

v.

BILL Jones, Secretary of State of the State of California; BRADLEY J. CLARK, Alameda County Registrar of Voters; and CONNY MCCORMACK, Los Angeles County Registrar of Voters,

Defendants.

PETER F. SCHABARUM and LEWIS K. UHLER,

Intervenors.

No. C 95-02638 CW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed: April 23, 1997
Richard Wieking
Clerk U.S. District Court
Northen District of California, Oakland

INTRODUCTION

Do the lifetime legislative term limits provisions of the California Constitution, as enacted by Proposition 140 in 1990, violate the United States Constitution? This question implicates some of the core values of our American system of government: majority rule, minority protections, the right to vote, the autonomy of the States, and the role of the federal courts in upholding constitutional principles.

Majority rule is the basic assumption of American government. The legitimacy of the democratic process, however, depends upon the ability of voters to express their political preferences at the ballot box. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Constitution provides a number of safeguards to protect the right of the people to vote for their representatives. Some of these safeguards are explicit, such as the right to vote regardless of race or gender. The United States Supreme Court has found others to be implicit, such as the principle of one person, one vote. The Supreme Court has observed that congressional term limits "violate that 'fundamental principle of our representative democracy ... that the people should choose whom they please to govern them.' " *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842, 1850, 1862 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

The United States Supreme Court has held that a State may impose reasonable, nondiscriminatory restrictions on the ability of citizens to vote for the candidate of their choice when the State has an important reason for imposing those restrictions. When a State's restrictions on the ability of potential candidates to run for office impose a severe burden on voters' or candidates' First or Fourteenth Amendment rights, however, the State must establish that those restrictions are narrowly tailored to accomplish compelling State interests. Otherwise the restrictions are unconstitutional. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Permissible restrictions typically require candidates to demonstrate a modicum of popular support or to comply with reasonable procedures meant to insure orderly elections.

California's version of lifetime legislative term limits differs from the restrictions that the Supreme Court has upheld in the past in that it imposes an absolute and permanent ban on the participation of a certain category of candidates: experienced legislators. This lifetime restriction on legislative service prevents voters who value legislative experience from expressing their preference when voting for their State legislators. It also permanently bars voters who support a particular term-limited candidate for the legislature from stating their support at the ballot box. Finally, it burdens voters' right to associate for the advancement of their political views by denying them the opportunity to rally around the candidates of their choice. California's version of term limits thus severely burdens the political process by denying voters the opportunity to vote for a category of candidates or for particular individuals whom they support.

California's sovereign interest in structuring its political institutions is due substantial deference. When a State restructures its political institutions in a manner that imposes a severe burden on the ability of citizens to vote for the representatives of their choice, however, the State must provide justifications in addition to its interest in determining its own political institutions. Otherwise State institutional decisions would be immune from federal constitutional scrutiny. The State also has a substantial interest in promoting political accountability. However, at the trial of this case, the State failed to establish, as it must, that a lifetime limit on legislative service is narrowly tailored to achieve this interest. Less restrictive versions of term limits would achieve the benefits attributed to lifetime term limits while imposing significantly less severe burdens on the rights of voters. Other reforms that do not restrict the ability of voters to vote for the candidates of their choice would also achieve the benefits attributed to lifetime term

limits.

This Court does not lightly overrule the political judgment of the California electorate. However, it is the singular duty of a federal court to determine when political judgment must give way to constitutional principle. " 'One's right to life, liberty, and property ... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.' A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-37 (1964) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)) (footnote omitted). When a law conflicts with the United States Constitution, it is the Constitution, not the expressed will of a majority of the voters, that must govern the Court's decision. "It is, emphatically, the province and duty of the judicial department, to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).[1] Because California's extreme version of term limits imposes a severe burden on the right of its citizens to vote for candidates of their choice, and because it is not narrowly tailored to advance compelling State interests, it violates the First and Fourteenth Amendments of the United States Constitution.

PROCEDURAL BACKGROUND

Former Assembly member Tom Bates and some of his supporters filed this lawsuit in 1995, seeking to enjoin enforcement of California's term limits so that Bates could run for reelection in 1996 to an eleventh term in the Assembly. The Court permitted the official proponents of Proposition 140, Peter Schabarum and Lewis Uhler, to intervene as Defendants. *Bates*

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[1]The Ninth Circuit's recent observation that judges should not unnecessarily thwart the political will of the people does not negate the Court's duty to enforce the United States Constitution. *See Coalition for Economic Equity v. Wilson*, Nos. 97-15031, 97-15030, 1997 WL 160667, at *4 (9th Cir. Apr. 8, 1997). As the Ninth Circuit recognized, if an initiative violates the Constitution, the district judge must "remind[ ] the people that they must govern themselves in accordance with" constitutional principles. *Id*

v. Jones, 904 F.Supp. 1080, 1086 (N.D.Cal.1995).[2] The Court denied Plaintiffs' motion for a preliminary injunction, as well as Defendant Secretary of State Bill Jones' motion to dismiss for failure to state a claim. *Id.* at 1098.

In March, 1996, Defendants moved for summary judgment, and Plaintiffs moved for leave to amend their complaint by adding as new Plaintiffs Assembly members Martha Escutia and Barbara Friedman and some of their constituents. The Court denied Defendants' motion for summary judgment and granted Plaintiffs' motion for leave to amend. Order, May 30, 1996.

Trial was conducted from October 15 to October 24, 1996. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law.

FACTUAL BACKGROUND

A. History of Term Limits

The movement to impose legislative term limits is a recent phenomenon, although one with some historical precedent in the eighteenth and nineteenth centuries.

The expectation that legislators would serve in office for a limited period of time, return to private life, and then perhaps serve again later, was widespread in colonial America. This practice was known as "rotation." Tr. 603 (Petracca).[3] Rotation was generally an informal social norm rather than a legal

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[2] In granting Intervenors' motion to intervene, the Court relied upon *Yniguez v. Arizona,* 939 F.2d 727 (9th Cir.1991), which held that sponsors of ballot initiatives have standing to defend them against court challenges. Recently, the Supreme Court questioned the reasoning in *Yniguez.* *See Arizonans for Official English v. Arizona,* 117 S.Ct. 1055, 1067-68 (1997). It is thus doubtful that Intervenors have standing. Because the State clearly does have standing to defend provisions of its own constitution, *Arizonans for Official English* does not affect the current posture of this case.

[3] Mark Petracca was the State's expert witness on term limits. An associate professor of political science at the University of California, Irvine, he has written extensively in favor of term limits and is a member of the board of *Legal Limits,* a periodical which reviews legal cases involving term limits.

mandate, but the Frameworks of Pennsylvania and Delaware, drafted in the 1680s, explicitly required it. Tr. 604. However, no colony imposed a lifetime limit on legislative service. Tr. 609. After independence, the Articles of Confederation limited delegates to Congress to three years of service in any period of six years. *U.S. Term Limits*, 115 S.Ct. at 1865-66; Articles of Confederation, art. V. The bills of rights of Massachusetts, Virginia, and a few other States enunciated the principle of rotation, but did not impose specific limits on legislative service. Tr. 604, 608. Of the States, only Pennsylvania formally required legislators to leave office after a specified period of time. No State imposed a lifetime limit on legislative service. Tr. 609.

Although the Constitutional Convention considered proposals to require members of Congress to rotate out of office, none was adopted. Tr. 89 (Fiorina); Tr. 397 (Jacobson);[4] *U.S. Term Limits*, 115 S.Ct. at 1859 & n. 22.

During most of the nineteenth century, rotation of office continued to be widely expected and practiced, but it was never formally imposed. Tr. 605 (Petracca). Especially after the presidency of Andrew Jackson, rotation came to be associated with the spoils system. It served as a device for insuring that the various elements of political coalitions all shared in the fruits of power. Tr. 90-91 (Fiorina). By the early twentieth century, however, rotation had become less prevalent. Tr. 607.

From the colonial era through the nineteenth century, the practice of rotation of office was distinct from the modern phenomenon of legislative term limits. Most importantly, rotation did not impose lifetime limits on the length of legislative service.

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[4]Morris Fiorina and Gary Jacobson were Plaintiffs' expert witnesses. Fiorina is a professor of Government at Harvard University. He has written extensively about representation and electoral accountability. Jacobson, a professor of political science at the University of California, San Diego, has written extensively on congressional elections.

Tr. 609 (Petracca); Tr. 91-92 (Fiorina). As the word "rotation" suggests, legislators were expected to serve for a period of time and then do something else, but former legislators were not barred from returning to the legislature after having taken some time off. Indeed, many nineteenth-century legislators were professional politicians. It was simply understood that one politician would not hold onto a particular office for a prolonged period of time. Tr. 92 (Fiorina). Candidates were generally not forbidden from seeking additional terms, and voters were not prevented from supporting them.

B. Professional Legislatures and Legislative Turnover

By the middle of the twentieth century, the ideal of a professional legislature capable of handling the complexities of modern, industrialized society and of countering executive authority largely supplanted the ideal of a citizen legislature made up of representatives who would return to private life after brief periods of legislative service. Tr. 68, 84 (Fiorina). After the Second World War, Congress and many State legislatures, including California's, became increasingly professionalized. Tr. 345 (Jacobson). Indeed, in 1966, Californians approved Proposition 1A, which institutionalized the ideal of a professional legislature. Legislators' salaries rose, legislative staffing increased, and legislative supervision of the budgetary process became more sophisticated. Tr. 97 (Fiorina).

In the late 1980s and the 1990s, sentiment grew that legislators were becoming too secure and isolated and therefore less responsive to their constituents. As a remedy for this perceived problem, twenty-one States enacted some form of legislative term limits. Most States with term-limits provisions restrict the number of consecutive terms that legislators may serve or limit the number of years that an individual may serve as a legislator within a specified time frame. Six States other than California have imposed lifetime limits on legislative service.[5]

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[5] The seven States with lifetime limits on legislative service are Arkansas, Ark.

Most courts have rejected challenges to the constitutionality of term limits for State or local legislators.[6]

C. Proposition 140 and *Legislature v. Eu*

In the late 1980s, the California legislature was perceived by

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Const. Amend. 73, § 2 (three terms in lower house, two terms in upper house); California, Cal. Const. art. V, § 2 (three terms in lower house, two terms in upper house); Michigan, Mich. Const. art. IV, § 54 (three terms in lower house, two terms in upper house); Missouri, Mo. Const. art. III, § 8 (eight years in one house, sixteen years in both houses); Nevada, Nev. Const. art. IV, §§ 3-4 (twelve years in lower house, twelve years in upper house); Oklahoma, Okla. Const. art. V, § 17A (twelve years service in both houses); and Oregon, Ore. Const. art. II, § 19 (six years in lower house, eight years in upper house, or twelve years in both houses).

The fourteen States with some other form of term limits are Arizona, Ariz. Const. art. IV, pt. 2, § 21 (four consecutive terms); Colorado, Colo. Const. art. V, § 3 (four consecutive terms in lower house, two consecutive terms in upper house); Florida, Fla. Const. art. VI, § 4 (eight consecutive years); Idaho, Idaho Code § 34-907 (eight years of service within previous fifteen years); Louisiana, La. Const. art. III, § 4(E) (three consecutive terms); Maine, Me.Rev.Stat.Ann. tit. 21-A, § 553 (four consecutive terms); Massachusetts, Mass.Ann.Laws ch. 53, § 48 (four terms in preceding nine years); Montana, Mont. Const. art. IV, § 8 (eight years within preceding sixteen years); Nebraska, Neb. Const. art. III, § 8 (two consecutive terms); Ohio, Ohio Const. art. II, § 2 (four consecutive terms in lower house, two consecutive terms in upper house); South Dakota, S.D. Const. art. III, § 6 (four consecutive terms); Utah, Utah Code Ann. § 20A-10-201 (twelve consecutive years); Washington, Wash.Rev.Code § 44.04.015 (six of previous twelve years in lower house, eight of previous fourteen years in upper house); and Wyoming, Wyo.Stat. § 22-5-103 (twelve of previous twenty-four years).

[6]See Dutmer v. City of San Antonio, 937 F.Supp. 587 (W.D.Tex.1996); *League of Women Voters v. Diamond*, 923 F.Supp. 266 (D.Me.) (denying preliminary injunction), *aff'd*, 82 F.3d 546 (1st Cir.1996); *Miyazawa v. City of Cincinnati*, 825 F.Supp. 816, 817 (S.D.Ohio 1993), *aff'd on other grounds*, 45 F.3d 126 (6th Cir.1995); *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349 (Ark. 1994), *aff'd on other grounds*, 115 S.Ct. 1842 (1995) (the constitutionality of State legislative term limits was not presented to the United States Supreme Court); *Legislature v. Eu*, 54 Cal.3d 492 (1991), *cert. denied*, 503 U.S. 919 (1992); *Roth v. Cuevas*, 603 N.Y.S.2d 962 (Sup.Ct.), *aff'd*, 603 N.Y.S.2d 736 (App. Div.), *aff'd*, 624 N.E.2d 689 (N.Y. 1993). *But see Thorsted v. Gregoire*, 841 F.Supp. 1068, 1081-82 (W.D. Wash.1994) (term limits on congressional service violate First and Fourteenth Amendments), *aff'd on other grounds*, 75 F.3d 454 (9th Cir.1996). For a discussion of the analysis of term limits in *Eu*, see the Court's previous published opinion on this case, *Bates*, 904 F.Supp. at 1093-95.

some to be under the control of a group of entrenched politicians more concerned with their own political survival than with the interests of their constituents or the well-being of the State. Proposition 140 was promoted as a means to break the grip of career politicians on the legislature and to promote greater public participation in the political process. The statement of purpose in Proposition 140 pronounced,

> The people find and declare that the Founding Fathers established a system of representative government based upon free, fair and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative.
>
> The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent.
>
> To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served.

Cal. Const. art IV, § 1.5. Proposition 140 restricted retirement benefits for legislators, reduced the legislature's budget, and amended section 2(a) of article IV of the California Constitution to limit senators to two four-year terms and Assembly members

to three two-year terms.[7] It also imposed term limits on a variety of other State offices. The present lawsuit does not challenge term limits on non-legislative offices.

On November 6, 1990, California voters approved Proposition 140 by a margin of 52.17% to 47.83%. The degree of support for Proposition 140 varied widely throughout the State. For example, in Assembly District 12, Bates' district prior to the 1992 reapportionment, 62.9% of the voters opposed the measure. In Assembly District 46, the district to which Friedman was originally elected, 59.5% of the voters voted against Proposition 140. A majority of the voters in thirty of California's eighty assembly districts voted against the initiative. In other assembly districts, of course, significant majorities supported term limits. *See* Supplement to Statement of Vote November 1990, Tr.Ex. 44.

In 1991, the California legislature, a number of individual members of the legislature, and some of their constituents challenged the facial validity of Proposition 140 by filing a petition for a writ of mandate in the California Supreme Court. The California Supreme Court exercised its original jurisdiction over the petition because of the great public importance of the issues raised by the challenge. *Eu*, 54 Cal.3d at 500. The California Supreme Court evaluated the challenge to Proposition 140 on the basis of the briefs and other papers submitted by the parties and *amici curiae*. No trial was conducted, and no lower court examined the merits of the parties' legal or factual contentions.

The California Supreme Court upheld most of the provisions of Proposition 140, including legislative term limits. *Id.* at 501.

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[7] Section 2(a) reads in its entirety:

The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years. *No Senator may serve more than 2 terms.*

The Assembly has a membership of 80 members elected for 2-year terms. *No member of the Assembly may serve more than 3 terms.*

(emphasized passages added by Proposition 140).

It also rejected the position advanced by the State Attorney General on behalf of the Secretary of State of California that the term limits provisions of Proposition 140 simply limited the number of consecutive terms that legislators may serve. *Id.* at 503. It instead held that Proposition 140 imposed a lifetime limit on service in the legislature. *Id.* at 506.

The California Supreme Court's holding that Proposition 140's lifetime legislative term limits provisions do not violate the United States Constitution does not bind federal courts. *See Watson v. Estelle,* 886 F.2d 1093, 1095 (9th Cir.1989) (State supreme court decisions construing federal Constitution do not bind federal courts). However, its construction of the term limits provisions of Proposition 140 does. *See Arizonans for Official English,* 117 S.Ct. at 1074-75 (State supreme courts provide definitive constructions of State laws). This Court, therefore, may not narrowly interpret the term limits provisions of Proposition 140 to avoid its constitutional difficulties.

D. The Parties

Between 1977 and 1996, Plaintiff Tom Bates represented the area comprising the current 14th Assembly District. The precise borders of his district have changed with each reapportionment, but it has consistently included the city of Berkeley and adjoining neighborhoods. The district has reelected Plaintiff Bates by wide margins since the 1990 elections. In 1992, he received 85.41% of the vote in the Democratic primary and 82.14% in the general election. In 1994, he was unopposed in the primary and received 78.5% of the vote in the general election. Tr.Ex. 2. Pursuant to Article IV, section 2(a) of the California Constitution, Bates was not allowed to run in the November, 1996, election and may never again run for the California Assembly. Bates may run for other offices, including the State Senate, but he would prefer to serve in the Assembly because he is already familiar with his assembly district and with the workings of the Assembly itself. Tr. 171.

Bates testified that term limits are detrimental to the ability of legislators to represent their constituents effectively. According

to Bates, it takes time for legislators to become familiar with their own districts and to develop areas of expertise. He believes that, as legislators gain expertise, their dependence upon lobbyists and executive branch agencies diminishes. Tr. 197-98. Legislators also become more skilled in navigating the complexities of the legislative process. Coaxing bills through the legislature can take years of education and coalition building. Tr. 193, 211-12. Passage of legislation, however, is only the first step in implementing the priorities of constituents. A reluctant executive branch can thwart legislative enactments in a variety of ways, such as by providing inadequate funding. Tr. 172. According to Bates, experienced legislators are more attuned to the ways in which the executive can circumvent legislative intent and are therefore more capable of ensuring that legislative enactments are actually implemented. Finally, according to Bates, experienced legislators who are likely to remain in the legislature for a significant period of time carry greater clout in their dealings with administrative agencies because the administrators realize they will probably have to continue dealing with those legislators in the future. Tr. 182. Term limits, Bates concluded, weaken the legislature and impede the ability of the legislature to enact reforms.

Plaintiffs Jonathan Browning, Lawrence Buchalter, Ardis Graham, Richard Lewis, Edward Lyman, Rachel Sherman, and Richard Sterling, voters in the 14th Assembly District, would have voted for Bates in 1996 if he had been a candidate. The voter Plaintiffs believe that Plaintiff Bates was an exceptional representative, who served his constituents well and was unusually concerned with and effective at representing the needs of low-income and disabled citizens and protecting the environment. They do not believe that other candidates would represent them as effectively and as well as Bates. Some of the voter Plaintiffs testified that Bates' legislative experience was an important reason for their support and that they tend to prefer candidates with legislative experience over candidates without legislative experience. Tr. 159-60 (Buchalter); Tr. 132 (Lyman).

Plaintiff Martha Escutia was first elected to represent the 50th Assembly District in Los Angeles in 1992. She received 46.81% of the vote in the 1992 Democratic primary and 75.04% in the general election. In 1994, she was unopposed in the primary and received 74.65% of the vote in the general election. She was unopposed again in the 1996 primary and was reelected to her third term in the general election. Tr. Ex. 25. In the absence of term limits, she probably would have run for either the Assembly or the Senate in 1998. Term limits prevent her from running for reelection to the Assembly, although not from running for election to the Senate.

At trial, she testified that during her first term she spent much of her time learning the legislative process. From her observation, legislators serving their final term became less effective because people dealing with them knew that they would soon be gone. She therefore fears that term limits will strengthen lobbyists and the executive branch at the expense of the legislature. Tr. 465-66. She also believes that term limits impede the formation of experienced minority leadership. Tr. 483.

Plaintiffs Sylvia Hernandez, Claudia Navar, and Ana Rosa Pena are voters in the 50th District who have voted for Escutia in the past, planned to vote for her in 1996, and would like to have the opportunity to vote to reelect her to the Assembly in 1998. Plaintiff Hernandez testified that she supports Escutia not only because of her stances on important political issues such as immigration, but also because of personal characteristics such as determination, commitment, and her approach to problem solving. Tr. 271. Hernandez believes that Escutia has become a more effective legislator over time. Tr. 274.

Plaintiff Barbara Friedman was elected to represent the 46th Assembly District in Los Angeles County at a special election on July 30, 1991. Since reapportionment, she has represented the 40th Assembly District, also in Los Angeles County. She received 15.99% of the vote in the 1991 special primary election and 72.54% in the special run-off election. She received 71.26% of the vote in the 1992 Democratic primary and 57.83% in the

general election. In 1994, she was unopposed in the Democratic primary and garnered 57.92% of the vote in the general election. Tr.Ex. 28. Term limits prevented her from running for reelection in 1996.

Friedman opposes term limits because they do not take into account the time it takes to master the legislative process, to become familiar with one's assembly district, and to train staff. Tr. 29-32. She believes that term limits will weaken the legislature's institutional memory and its ability to attract and retain skilled staff members. Tr. 33, 36.

Plaintiffs Harriet Brown Sculley and Susan Zarakov live in the 40th Assembly District, have voted for Friedman in the past, and would have liked to vote for her in 1996. Plaintiff Sculley testified that she supports Friedman not only because of her political positions, but also because she likes Friedman's style, responsiveness, and accessibility. Tr. 9-10. She believes that Friedman became a more effective representative in Sacramento the longer she served there. It was important for Sculley that Friedman represented her in the Assembly rather than at some other level of government because Assembly members can more easily represent community interests than, for example, State senators. Finally, Sculley testified that she prefers to vote for candidates with legislative experience rather than for inexperienced candidates. Tr. 15.

ANALYSIS

I. The Legal Standard

The parties agree that the test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and explained in *Burdick v. Takushi*, 504 U.S. 428 (1992), is the proper standard to apply. The *Anderson-Burdick* test evolved as the Supreme Court has considered the significance to assign to the First and Fourteenth Amendment rights implicated in "ballot access" cases, that is, challenges to laws governing the procedures and eligibility requirements for political parties or candidates to appear on ballots. *See, e.g., Burdick*, 504 U.S. 428 (upholding State's refusal to allow write-in votes); *Norman v. Reed*, 502 U.S. 279

(1992) (striking down requirement that small political parties gather large number of signatures to appear on ballot for certain local elections); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (upholding requirement that third party candidates receive 1% of primary vote in order to appear on general election ballot); *Anderson*, 460 U.S. 780 (striking down early filing deadline for third party candidates).

When determining the constitutionality of candidate eligibility requirements, a court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789. *Burdick* explained that,

> the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.

504 U.S. at 434, (quoting *Norman*, 502 U.S. at 289, and *Anderson*, 460 U.S. at 788).

The test is thus hybrid. If the Court finds that California's version of legislative term limits imposes severe restrictions on

Plaintiffs' First and Fourteenth Amendment rights, it must apply strict scrutiny. If the Court finds that the restrictions are not severe, it must balance the rights asserted by Plaintiffs against the precise interests advanced by the State to justify the burdens imposed on Plaintiffs' rights. When evaluating the State's interests, the Court must consider the extent to which those interests require the State to burden Plaintiffs' rights. Important regulatory interests of the State, however, are generally sufficient to justify "reasonable, nondiscriminatory restrictions."

Interests that the Supreme Court has held are sufficient to justify reasonable, nondiscriminatory restrictions on ballot access are usually related to the State's interest in conducting organized and fair elections. Thus, the Supreme Court has upheld requirements that new political parties or independent candidates demonstrate a modicum of popular support before being listed on ballots. *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). Similarly, restrictions on the ability of losing primary candidates to run in general elections have been approved. *Storer v. Brown*, 415 U.S. 724 (1974). The Court has struck down requirements that it believes prevent the expression of dissenting or minority political viewpoints. *See, e.g., Norman*, 502 U.S. 279 (burdensome signature-gathering requirement for political parties); *Anderson*, 460 U.S. 780 (early filing requirement for third-party or independent candidates); *Lubin v. Panish*, 415 U.S. 709 (1974) (large candidate filing fees when imposed on low-income candidates).

As noted, the *Anderson-Burdick* test has evolved in ballot access cases. California's version of term limits, however, does not merely limit access to the ballot, it defines one of the qualifications for holding legislative office. *See U.S. Term Limits*, 115 S.Ct. at 1870 (cases in which Supreme Court has upheld ballot access restrictions on congressional candidates have not imposed substantive qualifications rendering a class of potential candidates ineligible). By preventing a class of potential candidates from running for legislative office and by denying voters the opportunity to vote for a class of potential candidates,

term limits implicate First and Fourteenth Amendment rights at least as much as most ballot access provisions have. It would certainly be inappropriate to apply a more deferential test, such as rational basis review, to this case.

II. Application of the *Anderson- Burdick* Test to Term Limits

A. Individual Rights Implicated by Term Limits

The Supreme Court has repeatedly observed that laws defining the eligibility of candidates to appear on the ballot implicate the constitutional rights of both candidates and voters. In *Anderson,* for example, the Court observed,

> 'the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.' Our primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.'

Anderson, 460 U.S. at 786 (quoting *Bullock v. Carter,* 405 U.S. 134, 143 (1972)). *See also Burdick,* 504 U.S. at 438; *Lubin,* 415 U.S. at 716; *Williams v. Rhodes,* 393 U.S. 23, 30-31 (1968); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1397 (9th Cir.1991) ("the individual's right to seek public office is inextricably intertwined with the public's fundamental right to vote"), *cert. denied,* 501 U.S. 1252 (1991); *Erum v. Cayetano,* 881 F.2d 689, 691 (9th Cir.1989).

The cases on which the *Anderson* Court relied identified voting and associational rights as the rights most directly implicated by candidate eligibility requirements. 460 U.S. at 786-87 n. 7 (citing *Williams v. Rhodes,* 393 U.S. 23 (1968); *Bullock v. Carter,* 405 U.S. 134 (1972); *Lubin v. Panish,* 415 U.S. 709 (1974); *Illinois Elections Bd. v. Socialist Workers Party,* 440 U.S. 173 (1979)). *See also Burdick,* 504 U.S. at 438 (ballot access restrictions affect voting rights); *Munro,* 479 U.S. at 193 (restrictions on access of political parties to ballot impinge upon rights to associate and vote).

1. Voting Rights

" '[V]oting is of the most fundamental significance under our constitutional structure.' " *Burdick*, 504 U.S. at 433 (quoting *Illinois State Bd. of Elections*, 440 U.S. at 184). Indeed, " 'no right is more precious in a free country than that of having a voice in the election of those who make the laws under which ... we must live.' " *Id.* at 441 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). The Fourteenth Amendment " 'confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population.' " *Lubin*, 415 U.S. at 713 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring)). When announcing that seats in State legislatures must be apportioned on the basis of population, the Supreme Court declared, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Court explained that,

> representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.... Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.

Id. at 565.

California's term limits provisions deny voters the opportunity to support experienced legislators. Term limits thus provide voters who prefer candidates who are not "career politicians" a structural advantage over those who support a particular experienced legislator or who prefer candidates with legislative experience in general. By denying some, but not all, voters the ability to vote for the candidates of their choice, term limits

directly affect Plaintiffs' voting rights and their ability to participate on an equal basis in self-government.

Term limits thus burden Plaintiffs' Fourteenth Amendment right to participate on an equal basis with other voters in the election of their representatives. Term limits also burden Plaintiffs' First Amendment right of freedom of expression by imposing a content-based restriction on which candidates voters may vote for. The Supreme Court has held that States may impose reasonable, politically neutral restrictions on expressive activity at the polls. *Burdick*, 504 U.S. at 438. Term limits, however, are not politically neutral. They are a determination by the majority that one trait, legislative experience, is undesirable and that all voters should be prohibited from voting for candidates possessing that trait. A significant minority of voters are therefore absolutely precluded from expressing their political preference for experienced legislators when voting for their State representatives.

The Supreme Court has recently explained that congressional term limits are inconsistent with the ideal that the electorate should be able to choose its own representatives. In *U.S. Term Limits*, the Court observed that the imposition of term limits on Congress "would violate that 'fundamental principle of our representative democracy ... that the people should choose whom they please to govern them.' " 115 S.Ct. at 1850, 1862 (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)). The Court quoted Robert Livingstone, who declared during the Constitutional Convention that, "The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." *Id.* at 1851 (quoting 2 Elliot's Debates 292-93).

Although *U.S. Term Limits* is not controlling authority on the constitutionality of term limits for State legislatures, it does demonstrate how term limits impede Plaintiffs' abilities to have a voice in the selection of their representatives. By limiting Plaintiffs' ability to vote for their preferred candidates, the State is encroaching upon a fundamental principle of representative

democracy.[8] Proposition 140 therefore burdens Plaintiffs' right to vote for the candidates of their choice and the right of "each citizen [to] have an equally effective voice in the election of members of his state legislature." *Reynolds*, 377 U.S. at 565.

2. Right to Vote for Particular Candidate

The State concedes that its term limits provisions prevent citizens from voting for particular candidates. It seeks to minimize the significance of this restriction by arguing that voters do not enjoy a fundamental right to vote for the particular candidate of their choice. This observation is correct in the sense that ballot access provisions are not automatically subject to strict scrutiny simply because they exclude candidates who do not comply with their requirements. In *Burdick*, for example, the Supreme Court upheld Hawaii's prohibition on write-in voting. 504 U.S. at 441. By denying voters the ability to cast write-in ballots, Hawaii prevented voters from voting for candidates who had not complied with Hawaii's elections procedures. The Court upheld Hawaii's ban on write-in voting because Hawaii provided aspiring candidates a variety of other means of gaining access to the ballot. *Id.* Thus, voters can be denied the opportunity to vote for a particular candidate, provided that constitutionally adequate alternative means for appearing on the ballot were available to that candidate.

California's version of term limits, however, does not simply create a procedural hurdle or impose a temporary restriction. It permanently denies voters the opportunity to vote for particular candidates as well as for any candidates with extensive experience as a State legislator. The State's argument that the voter Plaintiffs do not have a fundamental right to vote for a particular

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[8]That term limits were imposed by popular initiative rather than by the legislature does not protect them from judicial review. Popular initiatives are held to the same constitutional standards as other legislation. A majority of voters may not deprive individuals of constitutional rights, just as the legislature may not. *See U.S. Term Limits*, 115 S.Ct. at 1858 n. 19; *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736 (1964).

candidate at a particular election is therefore not dispositive of Plaintiffs' challenge to the constitutionality of lifetime legislative term limits.

3. Freedom of Association

The right of voters "to cast their votes effectively" overlaps with "the right of individuals to associate for the advancement of political beliefs." *Williams*, 393 U.S. at 30. Although term limits do not directly prohibit individuals from associating for the advancement of common beliefs, they do limit the ability of individuals to take advantage of the galvanizing effects of elections on political organization. The exclusion of candidates from the ballot "burdens voters' freedom of association ... because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Anderson*, 460 U.S. at 787-88. *See also Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-25 (1989).

Term limits restrict Plaintiffs' freedom to associate because candidates who have been effective rallying points for political activity in the past are excluded from running for re-election. The voter Plaintiffs are thus denied the opportunity to rally political support behind their favored candidate for a particular office precisely because their favored candidate has been repeatedly successful in the past. Term limits therefore burden Plaintiffs' freedom of association by denying them the opportunity to use the device of a political campaign on behalf of their favored candidate to promote their political goals.

4. The Right to Run for a Particular Office

The State also contends that individuals do not have a fundamental right to run as candidates for particular offices. *See Clements v. Fashing*, 457 U.S. 957, 963 (1982) (plurality opinion); *Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir.1990), *cert. denied*, 499 U.S. 919 (1991); *Plante v. Gonzalez*, 575 F.2d 1119, 1126 (5th Cir.1978), *cert. denied*, 439 U.S. 1129 (1979). As explained above, however, the right of a candidate to run for office is intertwined with the voting and associational rights of the

electorate. The availability of political opportunity to particular candidates affects a broader range of interests than potential candidates' interests in seeking office. "[V]oters can assert their political preferences only through candidates or political parties.... The right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of voters". *Lubin*, 415 U.S. at 716. *See also Burdick*, 504 U.S. at 438.

The interest of Plaintiffs Bates, Escutia, and Friedman in running for the Assembly therefore merits protection because their interest in running for office necessarily implicates the voter Plaintiffs' voting and associational rights.

B. Severity of the Burden Imposed by Term Limits

Proposition 140 thus burdens Plaintiffs' fundamental rights to vote on an equal basis with others and to associate for the advancement of their political views. That term limits burden fundamental rights, however, does not end the Court's inquiry. The Court must also determine the severity of the burden that term limits impose on these rights.

The Supreme Court has not articulated a test for determining when a burden is severe. By referring to "reasonable, nondiscriminatory restrictions," *Anderson* and *Burdick* hinted at some possible criteria for determining the severity of the burden, but the terms "reasonable" and "nondiscriminatory" are not self-defining.

One year before *Anderson*, the Supreme Court upheld a Texas provision which prohibited justices of the peace from running for the legislature if they would have to cut short their service as justices of the peace in order to serve in the legislature. *Clements v. Fashing*, 457 U.S. 957, 968 (1982). The Court determined that this limitation did not significantly limit ballot access because it imposed, at most, a two-year waiting period on justices of the peace who desired to run for the legislature. *Id.* at 967-68.

Unlike the restriction at issue in *Clements*, Proposition 140 imposes a lifetime ban on term-limited legislators from being elected to the legislature. The holding of the Supreme Court in

Clements, which found that a brief waiting period does not constitute a significant barrier to candidacy, is not inconsistent with a finding that lifetime term limits impose a serious burden on Plaintiffs' constitutional rights. Indeed, *Clements*, by emphasizing the short-term nature of the restriction imposed on Texas justices of the peace, lends support to a finding that permanently excluding a class of candidates from the ballot imposes a serious burden on candidates' and voters' rights.[9]

The district court evaluating the constitutionality of Maine's limit on consecutive terms of legislative service offered a related approach for evaluating the severity of the burden imposed by term limits. It observed that there are "two key indicators of when a restriction moves from legitimate to severe: whether the restriction is content based or content neutral, and the extent to which the alternative routes to ballot access minimize the restriction on the plaintiff's rights." *League of Women Voters v. Diamond*, 923 F.Supp. 266, 269 (D.Me.1996) (denying preliminary injunction), *aff'd*, 82 F.3d 546 (1st Cir.1996). The court concluded that consecutive term limits impose a burden that is "clearly not *de minimis*" but that is also not sufficient to require strict scrutiny. *Id.* at 270.

The court justified its conclusion on two grounds. First, it argued that term limits "cannot fairly be characterized as content based" because such provisions do not "distinguish between or select among the range of ideas and political discourse from which voters can choose." *Id.*

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[9] A plurality of the Court in *Clements* argued that the Court should focus on whether ballot access provisions exclude "certain classes of candidates from the electoral process." *Id.* at 964. The plurality would apply heightened scrutiny when a ballot access provision was based on wealth or imposed burdens on small political parties or independent candidates. Otherwise, the plurality urged the Court to apply heightened scrutiny only after examining the extent of the burden imposed by the restriction on candidacy. *Id.* at 966. The test articulated more recently by a majority of the Court is less concerned with the particular classification used than with the "extent and nature" of the impact of ballot access provisions on voters. *Anderson*, 460 U.S. at 786.

A number of other courts have also emphasized the content neutrality of term limits when finding that they do not impose a severe burden on voters' rights. *Eu*, 54 Cal.3d at 519; *Roth*, 603 N.Y.S.2d at 971.

Term limits are content neutral in the sense that they do not target candidates on the basis of the views they espouse.[10] They are not content neutral in another, important sense. Proposition 140 targets legislators with legislative experience. In 1990, approximately 47.83% of the California electorate, and a majority of voters in thirty of California's eighty assembly districts, voted against the strict version of term limits imposed by Proposition 140. A portion of the vote against Proposition 140 was cast by voters who desired to retain the ability to vote for experienced candidates.[11] Proposition 140 prevents this minority from voting for candidates possessing a desired characteristic simply because those candidates possess that characteristic. That characteristic, legislative experience, distinguishes conflicting political views about the best forms of political representation. Term limits skew the electoral process by preventing a significant minority from at

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[10] However, some of the ballot access provisions that the Supreme Court has struck down were content neutral in this sense, too. Early filing deadlines or high filing fees do not explicitly target candidates on the basis of the message they espouse. The Supreme Court has found, however, that they are likely to impose burdens on the ability of some voters to express their preferences in the electoral process. *See Anderson*, 460 U.S. at 780 (striking down early filing deadline); *Bullock v. Carter*, 405 U.S. 134 (1972) (striking down high filing fees).

[11] It is difficult and unnecessary to determine precisely what portion of the electorate opposed term limits entirely. Another initiative on the November, 1990, ballot was Proposition 131, which would have instituted public campaign financing and limited Senators to three consecutive terms and Assembly members to six consecutive terms. Proposition 131 received only 37.75% of the vote. Tr.Ex. 50. No evidence was submitted to indicate how many voters supported the version of term limits in Proposition 131 but not the more extreme version in Proposition 140. Because Proposition 131 would not have imposed a lifetime limit on legislative service and provided for longer periods of uninterrupted service than Proposition 140, it would not have imposed the same kind of restriction on the ability of voters to vote for experienced candidates.

least voting for, if not electing, candidates who embody a particular view of political representation that is opposed by the majority. Term limits thus impose a content-based restriction on the ability of voters to vote for the candidates of their choice. *See Thorsted v. Gregoire*, 841 F.Supp. 1068, 1082 (W.D.Wash.1994), *aff'd on other grounds*, 75 F.3d 454 (9th Cir.1996).

League of Women Voters also stressed that Maine's limit on consecutive terms does not completely foreclose ballot access to incumbents. 923 F.Supp. at 270.[12] Term-limited legislators could sit out one or more terms and then run again, or they could run for a different office. *Id.* Proposition 140, in contrast, imposes a lifetime limit of three terms in the Assembly and two terms in the Senate. *Eu*, 54 Cal.3d at 506. Although term-limited Assembly members may run for other offices, they are absolutely precluded from running for the Assembly. Proposition 140 thus imposes a significantly greater burden on voters' and candidates' rights than the burden imposed by Maine's limit on consecutive terms, which itself was "clearly not *de minimis*."

Proposition 140 prevents Plaintiffs from expressing their political preference for candidates with legislative experience. Term limits therefore restrict the ability of certain voters to participate in the electoral process on an equal basis with other voters because of their political preferences for a particular category of candidates or for an individual candidate. In addition, unlike the majority of States that have imposed term limits on State legislators, California's version of term limits imposes a lifetime limit on legislative service. California voters who value

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[12] At least two other cases in which term limits were upheld also involved limits on consecutive service. *Miyazawa v. City of Cincinnati*, 825 F.Supp. 816, 817 (S.D.Ohio 1993), *aff'd on other grounds*, 45 F.3d 126 (6th Cir.1995); *Roth v. Cuevas*, 603 N.Y.S.2d 962 (Sup.Ct.), *aff'd*, 603 N.Y.S.2d 736 (App.Div.), *aff'd*, 624 N.E.2d 689 (N.Y. 1993).

legislative experience or a particular candidate are not simply required to defer expressing their preference, they are forever prevented from expressing their preference at the ballot box. *See also U.S. Term Limits*, 115 S.Ct. at 1870 (congressional term limits disadvantage particular class of candidates); *Thorsted*, 841 F.Supp. at 1082 (congressional term limits not neutral or nondiscriminatory because they determine outcome, not procedures, of election).

Because lifetime legislative term limits impose a content-based restriction on the eligibility of candidates for legislative office and because they permanently restrict Plaintiffs' ability to vote for their preferred candidates, the Court finds that the legislative term limits provisions of the California Constitution impose a severe burden on Plaintiffs' First and Fourteenth Amendment rights of voting, expression, and association.

C. Importance of the State's Interests in Term Limits

After considering "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," the Court must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule." *Anderson*, 460 U.S. at 789. The Court must also "consider the extent to which those interests make it necessary to burden [Plaintiffs'] rights." *Id.* The State has identified two general categories of interests that are served by term limits. First, it argues that States have a sovereign right to restructure their political processes and to define the qualifications for important State offices. Second, it contends that term limits advance a variety of interests related to enhancing political accountability and representation.

1. State Sovereignty

a. *Gregory v. Ashcroft* and the Political Function Cases

The State argues that the Tenth Amendment and principles of federalism protect its prerogative to determine the structure of government and the qualifications of its officers. The principal case on which the State relies is *Gregory v. Ashcroft*, 501 U.S.

452 (1991). In *Gregory*, the petitioners challenged the legality of a provision of the Missouri Constitution requiring State judges to retire upon reaching the age of seventy. They argued that the mandatory retirement provision violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and the Equal Protection Clause. The Supreme Court, noting the importance of a State's ability to prescribe the qualifications for holding State offices, crafted a "plain statement" rule. Under this rule, the Court would not construe federal employment laws to apply to important State offices absent an unambiguous statement of statutory intent. *Gregory*, 501 U.S. at 468-70. The Court held that the ADEA does not unambiguously apply to State judges; therefore, mandatory retirement provisions for State judges do not violate the ADEA. *Id.* at 470. Significantly, the Court did not hold that Congress could not pass legislation governing qualifications for holding important State offices. It simply held that, in the case of the ADEA, Congress had not legislated the retirement age of State judges.[13]

While discussing the significance of a State's ability to define the qualifications for holding important State offices, the Supreme Court observed that,

> Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. 'It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers ... should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.'

Id. at 460 (quoting *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900)). *See also Rodriguez v. Popular Democratic Party*, 457

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[13] The Court also reiterated that age is not a suspect classification. Applying rational basis review, it held that the mandatory retirement provision did not violate the Equal Protection Clause. *Id.* at 473.

U.S. 1, 8 (1982) ("The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference."). Although *Gregory* noted that the federal Constitution does place some limits on the power of State governments to define the qualifications for State office, it also pointed out that the "Court has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers. Rather, the Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment." *Id.* at 469.

Gregory identified the "political function" cases as examples of Fourteenth Amendment cases in which the Supreme Court deferentially reviewed States' power to define the qualifications for holding State office. These cases provide that laws excluding non-citizens from important governmental positions are subject to less rigorous scrutiny than laws that make classifications on the basis of alienage usually receive. *Id.* at 463 (citing *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)). In *Sugarman v. Dougall*, the Court declined to apply strict scrutiny to laws prohibiting non-citizens from holding offices that serve a political function because of the States' interest in preserving " 'the basic conception of a political community.' " 413 U.S. 634, 647 (1973) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)). Because the Court viewed non-citizens as falling outside the political community, States were justified in excluding non-citizens from positions intimately related to the life of the political community.

The political function cases upon which the *Gregory* Court relied for its observation are of little relevance to term limits. The Supreme Court's analysis in the political function cases turned on the ability of communities to restrict certain politically sensitive jobs to members of the political community. Term limits, in contrast, burden the ability of voters and candidates, the defining elements of the political community, to participate on an equal

basis in the electoral process.

Gregory does establish that States have a substantial interest in defining the qualifications for important State offices, but it is not dispositive in the context of term limits. *Gregory* observed that federalism sometimes limits the force of the Fourteenth Amendment, but, with the exception of the political function cases, it did not specify when federalism concerns override normal Fourteenth Amendment standards. Indeed, the Supreme Court has recently clarified that *Gregory* does not stand for the proposition that States may disregard basic constitutional protections when establishing the conditions of candidacy for State office. *Chandler v. Miller*, No.96-126, 1997 WL 176832, at *8 (S. Ct. April 16, 1997). Term limits implicate not only the Fourteenth Amendment, but also the First Amendment. *Gregory*, however, did not suggest that federalism concerns can override the strictures of the First Amendment. *See Chandler*, 1997 WL 176832, at *8 (State's power to establish qualifications for State offices does not diminish the constraints on State action imposed by the Fourth Amendment). Finally, as explained below, the Supreme Court has been especially rigorous in its application of the Fourteenth Amendment when the right to vote is at stake. *Gregory* did not involve voting rights.

b. Voting Rights Cases

The voting rights cases establish that the Fourteenth Amendment limits States' leeway in determining the basis for political representation. In *Baker v. Carr*, the Supreme Court held that the manner in which a State apportions legislative representation presents a justiciable controversy. 369 U.S. 186, 232 (1962). The Court observed that "the presence of a matter affecting State government does not render the case nonjusticiable." *Id.* In subsequent decisions, the Court held that State legislatures must be elected according to the principle of one person, one vote. *See, e.g., Reynolds*, 377 U.S. at 568; *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736 (1964).

These decisions struck at the heart of States' ability to decide

how to structure their electoral systems. *See Baker*, 369 U.S. at 334 (Harlan, J., dissenting). Moreover, the decisions held State governments to a different standard than the federal government. State senate districts, for example, were required to be determined on the basis of population, not political subdivision. *Reynolds*, 377 U.S. at 568. The Court explicitly rejected the argument that counties could serve as the basis for representation in State senates just as States are the basis for representation in the United States Senate. *Id.* at 573-75. The Court also rejected systems for the election of Statewide officers that were explicitly patterned after the Electoral College. *Gray v. Sanders*, 372 U.S. 368, 377-80 (1963).

The Fourteenth Amendment, then, was applied to overturn basic structures integral to State government, structures that had been in place for decades and that had direct federal analogies. The Supreme Court justified its far-reaching actions by pointing to the importance of providing all voters an equal basis for participating in the electoral process. That term limits reflect a basic decision by the State about what the character of the State legislature should be, therefore, does not establish that those decisions must necessarily survive constitutional review or that they should be subject to a more deferential standard of review. This is especially true given the manner in which term limits restrict Plaintiffs' voting rights.

c. State Sovereignty and Narrow Tailoring

Anderson and *Burdick* instruct courts to consider whether the means chosen by the State is narrowly tailored to accomplish the State's asserted interest. Insofar as sovereignty consists of the exercise of discretion, it is anomalous to ask whether a particular means chosen by the State is narrowly tailored to serve the State's interest in exercising its sovereignty. The State's sovereign interest, however, cannot be sufficient by itself to establish the constitutionality of political reforms. Otherwise, any political decision by the State could escape constitutional scrutiny. Because of the severity of the burden lifetime legislative term limits impose on voters' First and Fourteenth Amendment rights,

the State must identify other interests that are advanced by term limits. The State's sovereign interest in shaping its own political institutions and defining the qualifications for holding high political office, however, lends significance to the State's other interests.

2. Political Accountability and Representation

The State asserts six interests related to enhancing political accountability and representation: ending political careerism, overcoming incumbent advantages, increasing electoral competition, encouraging qualified candidates to run for office, and reinstating rotation, a "central tenet of republican government." Many of these interests, however, rest on the State's assumption that legislators had become invulnerable to the normal means of insuring political accountability during the 1980s.

a. Legislative Turnover

The State has not proven its factual assertions that legislators attained unprecedented job security during the 1980s and had become invulnerable and insensitive to less drastic measures designed to insure political accountability. The State's expert testified that the rate of turnover in the legislature declined noticeably between the 1970s and 1980s. Tr. 553 (Petracca), Tr.Ex. 69. He attributed increased turnover during the early 1990s to anticipation of the implementation of term limits in 1996. Tr. 569. Plaintiffs' expert, however, demonstrated that the relatively high turnover rates during the 1970s and the relatively low turnover rates during the 1980s were part of a cyclical pattern in legislative turnover that has prevailed since the end of the Second World War. Tr. 345-50 (Jacobson), Tr.Exs. 32-38. It is thus inaccurate to describe the 1980s as a decade of unprecedented low rates of turnover.

The State also failed to establish that term limits were necessary to break the pattern of low legislative turnover that some perceived as emerging during the 1980s. Although legislative turnover in California increased following the approval of Proposition 140, turnover also increased in the United States

House of Representatives, which was not affected by term limits. Tr. 358-62 (Jacobson), Tr.Ex. 38. Plaintiffs attribute increased turnover during the early 1990s in both the California legislature and the House of Representatives to a variety of factors: legislative reapportionment, a spate of scandals, and national political trends. Tr. 359. A similar combination of influences was also responsible for relatively high rates of turnover during the 1970s. Tr. 352. Even assuming that low rates of legislative turnover are undesirable and that turnover declined to an unprecedented low during the 1980s, then, the State has failed to establish that term limits were necessary to rectify the low turnover rates of the 1980s.

b. The State's Interests

i. Political Careerism

The preamble to Proposition 140 declared political careerism to be one of the problems afflicting California politics. Cal. Const. art. IV, § 1.5. Legislative term limits do not prevent people from making careers as politicians. They limit the amount of time that individuals may serve in the legislature, but they do not prevent legislators from running for other political offices, nor do they prevent individuals who have spent a lifetime in other political offices from running for the legislature.

Term limits do prevent individuals from pursuing careers as State legislators, but the State has not established that its interest in preventing people from pursuing careers in the legislature is important enough to justify the burden that term limits impose on voting rights. The State contends that professional politicians become socialized in a culture of government and therefore become distant from and unresponsive to their constituents. Tr. 536 (Petracca). Non-professional legislators, the State maintains, will introduce fresh ideas into the legislative process, be less motivated by concerns for their careers, and more responsive to constituents' concerns. Tr. 537.

Concern for their own careers, however, motivates those who hope to pursue a legislative career to be responsive to constituents. Re-election is a powerful incentive for legislators

to be attentive to constituents' needs and priorities. Tr. 82-83 (Fiorina); 342-44 (Jacobson). Voters have the ability to elect someone else if their legislator ceases to represent their interests or their views.

Term limits reflect an ideological preference for "citizen" or amateur legislators. The State has a legitimate interest in allowing voters to express their preference for amateur legislators, but it does not have a legitimate interest in preventing other voters from expressing their ideological preference for career or professional legislators. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

The State has therefore failed to establish that the pursuit of legislative careers, by itself, impedes effective representation or electoral competition. Ending legislative careerism, therefore, is not a substantial or compelling State interest.

ii. Advantages of Incumbency

The strongest interest articulated by the State is the State's interest in reducing the advantages that incumbents enjoy over rival candidates simply because they are incumbents. Incumbency confers a variety of advantages on legislators. Some of these advantages are inherent in the position; others generally accompany incumbency but can be restricted or eliminated. Some advantages are the fair rewards of desirable behavior; others may be unfair and undeserved.

Inherent advantages of incumbency include visibility, public recognition, and gratitude for services rendered. Visibility and recognition facilitate communications between legislators and their constituents and permit the public to monitor their political representatives. Tr. 71 (Fiorina). The gratitude that legislators earn by representing the political interests of their constituents is itself an important incentive for legislators to remain attentive to voters. To the extent that term limits diminish the value of visibility and gratitude, they may make legislators less sensitive to

the priorities of their constituents. Tr. 84. The State has therefore failed to establish that it has a significant interest in eliminating these inherent advantages of incumbency.

Other advantages of incumbency, however, are less desirable in the legislative process. Among the most significant of these advantages are fundraising ability, the perquisites of office, and control over legislative redistricting. Tr. 73-75. The State does have a compelling interest in limiting these advantages because they hinder political accountability and discourage political opposition.

Although term limits are one way to eliminate these advantages, the State did not establish that other, less constitutionally intrusive reforms, would be less effective than term limits. Perquisites of office can be, and to an extent already have been, restricted by initiative or by normal legislation. Control over legislative redistricting can be assigned to a nonpartisan body, as occurred following the 1990 census. Public financing of legislative campaigns could reduce the significance of political fundraising.[14]

Even if the State had established that nothing short of a ban on incumbents from seeking re-election could overcome the unfair advantages of incumbency, it has not established that this ban must be permanent. Some advantages of incumbency, such as the perquisites of office, vanish as soon as an incumbent leaves office. Others, such as recognition and gratitude, fade over time. Professor Jacobson studied the success of former members of Congress who ran for re-election after being out of office. Most of these former congress members ran for re-election within four

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[14] The State argues that public financing of campaigns is not a realistic alternative to term limits and therefore does not establish that term limits are an overbroad solution to incumbent advantages. The California electorate's past refusal to adopt reforms that are narrowly tailored to redress incumbent advantages in fundraising, however, cannot shield term limits from constitutional scrutiny. The State's argument is tantamount to saying that popular but unconstitutional solutions to serious problems should survive judicial scrutiny if narrowly tailored, constitutional solutions to those problems are unpopular.

years of leaving office. He found that former congress members are no more likely to be elected than other candidates who have prior political experience. Tr. 379.

Although the State does have a compelling interest in limiting the undesirable advantages of incumbency, other reforms that do not raise significant constitutional problems would also advance the State's interest. Lifetime term limits, therefore, are not narrowly tailored to accomplish the State's interest in diminishing the undesirable advantages of incumbency.

iii. Electoral Competition

The State argues that term limits advance its interest in promoting electoral competition. Incumbents generally do not face serious challenges in primary elections and often escape serious challenges in general elections as well. *See* Tr.Ex. 69. In addition, larger numbers of candidates run for open seats than for seats held by incumbents seeking re-election, and the margin of victory in contests for open seats tends to be closer. Tr. 560-67 (Petracca). Because term limits will periodically create open seats, the State contends, more electoral competition will result.

As used by the State, the term electoral competition refers to increasing the number of candidates running for office and decreasing the margins by which candidates win elections. Neither of these interests, by themselves, are compelling interests because it is not self-evident that they have a desirable effect on government. The State's argument is tantamount to saying that electoral competition will be improved by eliminating the strongest competitors from the field. The State argues, however, that intensifying electoral competition is a compelling State interest because it will have the effect of increasing the opportunity for the electorate to make judgments about party platforms and promoting clearly defined debate about public policy choices. Tr. 571-77.

By periodically preventing incumbents from running for re-election, term limits may help focus debate on the political stances of the candidates and their parties rather than on how well the incumbent has represented the district. Although the State

has a legitimate interest in encouraging debate about public policy, for the State to promote a favored form of political discourse by preventing voters from voting for a disfavored category of candidates raises serious First Amendment and voting rights concerns. *See Buckley*, 424 U.S. at 48-49. The State, therefore, cannot justify term limits on the grounds that they encourage certain forms of political debate.

The State's argument overlooks one of the main purposes of electoral competition: promoting electoral accountability. The threat of electoral competition encourages incumbents to be attentive to their constituents' needs and to represent their interests vigorously. Tr. 82 (Fiorina). That incumbents often face weak challengers in elections does not necessarily indicate that they are unaccountable to their constituents. It may indicate that they are forestalling serious opposition by representing their districts in a manner their constituents support.

Indeed, term limits may undermine electoral accountability by reducing incentives for legislators to represent their districts. Tr. 84 (Fiorina); 384 (Jacobson). It takes a major investment of time and effort to become familiar with a legislative district. The possibility of re-election is a strong incentive for legislators to make this investment. Term limits diminish the incentive for undertaking this work because legislators can no longer look forward to the possibility that their hard work will yield political dividends in subsequent elections. Tr. 391-92 (Jacobson).

Even if the State had established that increasing the number of candidates running for office and decreasing the margin by which candidates win elections were compelling interests, it has not established that lifetime term limits are narrowly tailored to accomplishing these interests. Limiting the number of consecutive terms that legislators may serve would also periodically create open-seat elections.

The State, therefore, has failed to establish either that increasing the number of candidates running for office and decreasing the margin by which candidates win elections are compelling interests or that lifetime term limits are narrowly

tailored to accomplishing these goals.

iv. Encouraging Qualified Candidates

The State also argues that term limits will encourage more and better qualified candidates to run for legislative office. Because term limits will create more open seats than otherwise would have occurred, it is probably true that term limits will encourage more people to run for the legislature. There is no evidence that those candidates will be more qualified. It is incongruous to argue that term limits will encourage better candidates to run for office while at the same time preventing popular candidates from running for re-election.

Although it is legitimate for the State to create conditions that will encourage more individuals to run for legislative office, for the State to encourage some candidates by forbidding others from running raises serious First Amendment concerns. *See Buckley*, 424 U.S. at 48-49.

The encouragement that term limits provide to qualified candidates who would not otherwise run for the legislature, therefore, does not constitute a compelling State interest. Neither is the lifetime ban narrowly tailored to achieve this result.

v. Representativeness of Legislature

The State also contends that term limits will make the legislature more representative. The State's expert, Professor Petracca, argued that term limits make the legislature more demographically and ideologically representative. Tr. 586.

The evidence is mixed concerning the effects of term limits on demographic representation within the legislature. Term limits probably will increase the number of women in the legislature in the short term. In elections for open seats to the legislature, male and female candidates fare equally well. Incumbents, however, enjoy an advantage over challengers. Because incumbents have been disproportionately male, it is logical to conclude that term limits will accelerate the rate at which women become legislators. Tr. 589 (Petracca); Tr. 395 (Jacobson). This will be a short-term phenomenon, however.

It is not clear that term limits will make the legislature more

representative of other demographic groups. Legislative reapportionment has been the predominant factor behind the increasing representation of ethnic minorities. Tr. 394 (Jacobson). It is doubtful that term limits alone will produce more candidates from less affluent sectors of society. Tr. 393. Term limits may encourage more candidates with background in business, although this is disputed. Tr. 593 (Petracca); Tr.Ex. 69, table 14.

The effects of term limits on the demographic composition of the legislature, thus, are speculative. Speculation about the possible effects of term limits cannot justify the severe burdens imposed on the ability of voters to vote for candidates of their choice. Even if the State's argument that term limits will make the legislature more demographically representative were not speculative, the State has not established that lifetime term limits will be more effective at achieving this goal than limits on consecutive terms.

The State also argued that term limits will make the legislature more ideologically representative. Term limits will accomplish this, according to the State, because political debate will focus less on the incumbent's ability to provide constituent services than on candidates' political stances. Tr. 595-96 (Petracca). The First Amendment, however, prohibits the State from restricting expressive activity in order to promote favored forms of political discourse. Therefore, the State cannot justify term limits on the ground that preventing voters from voting for certain candidates will result in a more elevated form of political debate.

vi. Rotation

The State also maintains that "term limits reinstate rotation, a central tenet of republican government." By equating term limits with the eighteenth- and nineteenth-century practice of rotation of office, the State seeks to establish that term limits are a legitimate innovation with deep roots in American history. The State also attempts to establish that term limits are entirely consistent with principles of republican self-government.

Term limits resemble the historical practice of rotation to the

extent that both prevent prolonged, uninterrupted legislative service. As explained above, however, California's extreme version of term limits is quite different from rotation in that it imposes a lifetime cap on legislative service. The State also exaggerates the centrality of rotation to early American political philosophy. It was a widespread practice, but few States imposed rotation as a formal requirement. The Constitutional Convention considered and rejected proposals to require rotation. *See U.S. Term Limits,* 115 S.Ct. at 1859-60.

That rotation was a widespread practice in the eighteenth and nineteenth centuries, however, does not establish that California has a compelling or important interest in reinstating rotation and converting it into a lifetime ban. In addition, most of the evidence the State presented concerning rotation antedates the ratification of the Fourteenth Amendment. All of it precedes important Supreme Court decisions concerning voting rights and ballot access. Instituting a form of rotation, therefore, does not constitute a significant State interest.

D. Lifetime Term Limits and Narrow Tailoring

As explained above, lifetime term limits are not narrowly tailored to achieve the goals articulated by the State. Indeed, the State's own expert testified that he prefers a limit on the number of consecutive terms that legislators may serve to lifetime term limits. He believes that lifetime term limits squander valuable legislative experience. Tr. 687. The most obvious method of making California's version of term limits more narrowly tailored would be to convert it into a limit on the number of consecutive terms that legislators may serve.[15]

The State contends, however, that consecutive term limits would not achieve its goals for several reasons. The most significant of these reasons are placeholding legislators and the creation of a revolving door between the legislature and lobbying

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[15] The Court expresses no opinion on the constitutionality of any form of term limits other than the lifetime legislative term limits imposed by Proposition 140.

firms. Tr. 619; *see also Eu*, 54 Cal.3d at 523. The State fears that term-limited legislators will make deals with their successors whereby their successors would agree to step aside once their predecessors become eligible for office again. Although it is conceivable that such deals might occasionally be made, such speculation is insufficient to justify permanently restricting voters' choice of candidates. The danger that legislators will leave office to work in lobbying firms only to return to the legislature a few years later can be limited by legislation.

The Court therefore rejects the State's contention that consecutive term limits would create problems which are serious enough to justify the imposition of lifetime term limits.

E. Summary

Two of the interests asserted by the State are compelling: its sovereignty interest in defining its own political institutions and its interest in reducing the unfair electoral advantages incumbents enjoy. The State's other interests do not stand up to close examination.

The lifetime legislative term limits provisions of the California Constitution are not narrowly tailored to serve the State's compelling interests. The State's sovereign interest in reforming its political institutions is not sufficient, by itself, to justify measures which burden rights protected by the First and Fourteenth Amendments. California's version of lifetime term limits is not narrowly tailored to reduce the electoral advantages of incumbency. A variety of targeted reforms could redress the most troublesome advantages of incumbency. Less drastic versions of term limits would also be effective at significantly reducing the undesirable advantages of incumbency.

CONCLUSION

The lifetime term limits on State legislative offices enacted by Proposition 140 impose a severe burden on Plaintiffs' First and Fourteenth Amendment rights of voting and association. The State has not established that lifetime term limits are narrowly tailored to serve a compelling State interest.

The Court therefore

1. DECLARES that the lifetime term limits provisions contained in section 2(a) of article IV of the California Constitution violate the United States Constitution;

2. ENJOINS Defendants Clark and McCormack from enforcing the lifetime term limits provisions contained in section 2(a) of article IV of the California Constitution against Plaintiffs and to accept the declarations of intention to be a candidate and the nomination papers when tendered by Plaintiffs Bates, Friedman, or Escutia; and

3. ENJOINS Defendant Jones from enforcing the lifetime term limits provisions contained in section 2(a) of article IV of the California Constitution against Plaintiffs, to accept and process the declarations of intention to be a candidate and the nomination documents of Plaintiffs Bates, Friedman, or Escutia, to certify Plaintiff legislators' eligibility to be candidates (if all other requirements are met), and to certify the elections results if Plaintiff legislators win the election.

STAY PENDING APPEAL

Under Federal Rule of Civil Procedure 62(c), the Court has discretion to stay an injunction during the pendency of an appeal. The standard for granting a stay is the same as the standard for granting a preliminary injunction: a showing of " 'either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply' " in favor of the party subject to the injunction. *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir.1988) (quoting *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1201 (9th Cir.1980)). The constitutionality of legislative term limits is an issue of first impression in the Ninth Circuit. The State has raised serious questions concerning the constitutionality of term limits. The balance of hardships involved in enforcing the injunction before these questions are finally decided tips sharply in the State's favor. Enjoining enforcement of term limits prior to appellate review may throw the State's electoral process into confusion. Staying the injunction may effectively deny Plaintiffs

the opportunity to seek re-election to the Assembly in 1998, but, should the judgment of the Court be affirmed on appeal, it will not permanently deny Plaintiffs the opportunity to seek election to the Assembly. The Court therefore STAYS the injunction granted in this order for thirty days and, if the State files an appeal, during the pendency of the appeal to the Ninth Circuit Court of Appeals.

IT IS SO ORDERED.

Dated: April 23, 1997

s/ CLAUDIA WILKEN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOM BATES, et al., Plaintiffs-Appellants, vs. BILL JONES, Secretary of the State of California, et al., Defendants-Appellees, and PETER F. SCHABARUM, et al., Intervenors-Appellees.	)	No. 97-15864 DC# CV-95-2638-CW Northern California (Oakland)
TOM BATES, et al., Plaintiffs-Appellees, vs. BILL JONES, Secretary of the State of California, et al., Defendants-Appellants, and PETER F. SCHABARUM, et al., Intervenors-Appellants.	)	No. 97-15914 DC# CV-95-2638-CW Northern California (Oakland)

Filed: May 23, 1997
Cathy Catterson, Clerk
U.S. Court of Appeals

Before: FLETCHER, REINHARDT and FERNANDEZ, Circuit Judges

The Court, sua sponte, consolidates these two appeals. The parties' stipulated motion to extend the time until May 30, 1997 to file the opposition to the motion to vacate the stay filed

in appeal no. 97-15864 is granted. The optional reply may be filed on June 6, 1997.

Because the public has an interest in the speediest possible resolution of this dispute and the court desires to act, if possible, in a manner that will permit all concerned to conduct themselves in a fully informed manner with respect to the 1998 elections, we modify the parties' stipulation regarding the time for filing the briefs, and adopt the following schedule and procedure.

The briefing on the motion to vacate the stay addresses the merits of appeal no. 97-15864. Accordingly, no further briefing will be allowed for purposes of that appeal.

The following briefing schedule shall govern appeal no. 97-15914: the opening briefs by the State and the Intervenors shall be filed on or before June 9, 1997; the answering brief shall be filed on or before June 23, 1997; the optional reply brief shall be filed on or before June 30, 1997. No extensions of time will be granted.

The motion to vacate the stay filed in appeal no. 97-15864 is referred to the panel that will be assigned to hear the merits of these appeals.

The Clerk shall place these appeals on the August San Francisco calendar.

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOM BATES, et al., Plaintiffs-Appellees, v. BILL JONES, Secretary of the State of California, et al., Defendants-Appellants, and PETER F. SCHABARUM, et al., Intervenors-Appellants.	))))))))	Nos. 97-15914 97-15864 DC No. 95-CV-2638 **ORDER**

Filed: Aug. 8, 1997
Cathy Catterson, Clerk
U.S. Court of Appeals

Before: SNEED, FLETCHER, and REINHARDT, Circuit Judges

The parties are directed to advise the Court by separate letter responses to be filed no later than August 12, 1997, of their best estimates as to the time period in which incumbents who may wish to decide whether to seek re-election to the offices that they are barred from holding by Proposition 140 must be advised whether the measure is valid.

APPENDIX E

DANIEL E. LUNGREN
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DEPARTMENT OF JUSTICE

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August 12, 1997

Ms. Cathy Catterson, Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street, P.O. Box 193939
San Francisco, CA 94119-3939

RE: Bates v. Jones
97-15684 & 97-15914

Dear Ms. Catterson:

Defendant and Appellant Secretary of State Bill Jones by this letter responds to the Order filed on August 8, 1997 directing a response "as to the time periods in which incumbents who may wish to seek reelection to offices that they are barred from holding by Proposition 140 must be advised whether the measure is valid." The Secretary of State assumes that "incumbents" refers to incumbent members of the California Legislature and limits its response to the requirements for candidates to those offices.

A declaration of intention to become a candidate for party nomination is the first required document that must be filed by the candidate. Candidates who wish to have their names appear on the ballot in the June 1998 primary election must file a declaration of intention to become a candidate not more than 14, nor less than five, days before they file their nomination papers. Calif. Elect. Code §§ 8022, 8023, 8350. The nomination papers must be filed during a window period that runs from 113 days to 88 days before the primary election. Calif. Elec. Code § 8020 (a) & (b).[16] Therefore, the declaration of intention period runs from 127 to 118 days prior to the election. Since the primary election will be held on June 2, 1998, the window period for filing the declaration of intention to become a candidate will run January 26, 1998 to February 4, 1998.[17]

A decision from this court upholding the constitutionality of California's legislative term limits should be effective by January 26, 1998, the beginning period for the filing of the declaration of intention to become a candidate. In any event, the decision should be effective not later than a reasonable time before February 4, 1998 to permit candidates to comply with the deadline for the filing of a declaration of intention to become a candidate.

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[16]If a candidate wishes to submit a petition containing signatures of registered voters in lieu of a filing fee, the in-lieu-filing fee petition must be filed at least 15 days prior to the close of the nomination period. Calif. Elect. Code §8106.

[17]If the incumbent fails to file a timely declaration of candidacy, the time for persons other than the incumbent to file such a declaration is extended until February 9, 1998, the first day for filing nomination papers. Calif. Elect. Code § 8022 (a) & (b). If, however, the incumbent's failure to file a timely declaration was due to the fact that he or she has already served the maximum number of permitted terms, there is no extension of time. Calif. Elect. Code § 8022(a). Also, prospective write-in candidates must file a statement of write-in candidacy and nomination papers during a window period that runs from the 57th day to the 14th day prior the election. Calif. Elect. Code § 8601. Thus, write-in candidates for the June 1998 primary must file the required papers between April 6 and May 19, 1998.

On the other hand, an affirmance by this Court would not suffice to advise incumbents whether the measure is valid. As Justice Fletcher noted in *Bland v. Fessler*, 88 F.3d 729, 739 (9th Cir. 1996), the California courts do not regard themselves as bound by Ninth Circuit interpretations of the United States Constitution. See *People v. Bradley*, 1 Cal.3d 80, 86 (1969); *Raven v. Deukmejian*, 52 Cal.3d 336, 352 (1990). California courts would continue to be bound by *Legislature v. Eu*, 54 Cal.3d 492 (1991), cert. denied, 503 U.S. 919 (1992). Thus, an affirmance would create a conflict between the federal and state courts as to all candidates who are neither a party to this litigation nor were a party to *Legislature v. Eu*. The conflict could only be resolved by a United States Supreme Court ruling binding on both the state and federal courts. This is, of course, one reason that in the event of an affirmance it would be important to maintain the stay of the injunction of the district court pending all further appellate review.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

/s/ PAUL H. DOBSON
Deputy Attorney General

PHD:ls
cc: Joseph Remcho, Esq.
Deborah La Fetra, Esq.
Prof. Einer Elhauge, Esq.

APPENDIX F

NOR FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOM BATES, et al., Plaintiffs-Appellants, v. BILL JONES, et al., Defendants-Appellees, and PETER F. SCHABARUM, et al., Intervenors-Appellees.	)	No. 97-15864
TOM BATES, et al., Plaintiffs-Appellees, v. BILL JONES, et al., Defendants-Appellants, and PETER F. SCHABARUM, et al., Intervenors-Appellants.	)	No. 97-15914 **ORDER**

Filed: Aug. 19, 1997
Cathy Catterson, Clerk
U.S. Court of Appeals

The parties, including the intervenors, are directed to file simultaneous letter briefs on or before August 29, addressing the following question:

> Assuming the Initiative Measure 140, by imposing a lifetime ban on incumbents seeking legislative office,

severely limits the voters' right to vote for whomever they choose, is the facial ambiguity of the Measure, as recognized by the California Supreme Court in Legislature of the State of California v. Eu, 816 P.2d 1309, 1315 (Cal. 1991), relevant to its constitutionality?

Copies of the letter briefs shall be delivered to the offices of all counsel and to the home chambers of the panel members, on or before the above date, at the following addresses:

Hon. Joseph Sneed
U.S. Circuit Judge
95 Seventh Street
7th and Mission, Room 326
San Francisco, California 94103

Hon. Betty Fletcher
U.S. Circuit Judge
U.S. Courthouse
1010 Fifth Avenue, Suite 1000
Seattle, Washington 98104

Hon. Stephen Reinhardt
U.S. Circuit Judge
U.S. Courthouse
312 North Spring St., Room 1747
Los Angeles, California 90012

An extra copy shall be delivered to:

Hon. Stephen Reinhardt
c/o Clerk's Office
U.S. Court of Appeal Bldg.
125 So. Grand Ave.
Pasadena, California 91109

Appellants' brief shall not exceed eight pages and intervenors' briefs shall not be longer than four, although the two parties defending the Measure may reallocate the total of twelve pages among themselves. Appellees' brief shall not exceed twelve pages. All letter briefs shall be double spaced and conform to the rules regarding type size applicable to printed briefs.

For the Court, Cathy A. Catterson, clerk of the Court, by express direction of the Court

s/Gwen Baptiste
Deputy Clerk

APPENDIX G

NOR FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOM BATES, et al., Plaintiffs-Appellants, v. BILL JONES, et al., Defendants-Appellees, and PETER F. SCHABARUM, et al., Intervenors-Appellees.	)	No. 97-15864
TOM BATES, et al., Plaintiffs-Appellees, v. BILL JONES, et al., Defendants-Appellants, and PETER F. SCHABARUM, et al., Intervenors-Appellants.	)	No. 97-15914 **ORDER**

Filed: Sep. 2, 1997
Cathy Catterson, Clerk
U.S. Court of Appeals

Before: SNEED, FLETCHER, and REINHARDT, Circuit Judges.

The Court is desirous of resolving the issues involved on this appeal in a manner that will be of as much benefit as possible to the parties and the public in connection with the next regularly

scheduled general election. The court would like to be able to decide all relevant procedural and substantive questions in time to permit any and all parties to seek whatever relief may be practicable from the United States Supreme Court in a timely manner. The court is also aware that there is an interest in orderliness and uniformity in the electoral process, and that all parties must know with certainty at the earliest possible date the law that will govern the 1998 legislative elections.

The state's letter of August 12, 1997 suggests that uncertainty may exist as to the extent to which the court's decision will be binding with respect to the candidacies of legislators and former legislators who are not parties to this appeal and with respect to the interests of voters who are not represented in this appeal by other voters resident in the same legislative district.

In light of the state's letter, it appears to the court that additional legislators, former legislators, and voters may file motions to intervene on appeal. Such motions will be considered by the court if filed on or before September 16, 1997. The state may respond to such motions on or before September 23, 1997. All motions to intervene shall comply with the ordinary rules governing such motions. A single motion listing the names of all proposed intervenors and a single supporting memorandum is favored. Any memorandum in support of the motions shall not exceed 15 pages and shall address, inter alia, the question whether parties to Legislature v. Eu, 54 Cal.3d 492 (1991), may, notwithstanding their earlier participation in the state proceedings, intervene under the "public interest" exception set forth in, e.g., Kopp v. Fair Political Practices Comm'n., 905 P.2d 1248, 1255-57 n.16 (Cal. 1995); Arcadia Unified School Dist. v. State Dep't of Educ., 825 P.2d 438, 441-42 (Cal. 1992), or the "inequitable administration of the laws" exception described in, e.g., Rutherford v. State, 233 Cal. Rptr. 781, 789-90 (Cal.App.4 Dist. 1987). The state and intervenors Schabarum and Uhler's combined response shall be subject to the same 15-page limit applicable to the potential intervenors. Copies of all motions, memoranda, and responses shall

be delivered to the offices of all counsel and to the home chambers of the panel members, on or before the dates set forth above, at the following addresses:

Hon. Joseph Sneed
U.S. Circuit Judge
95 Seventh Street
7th and Mission, Room 326
San Francisco, California 94103

Hon. Betty Fletcher
U.S. Circuit Judge
U.S.Courthouse
1010 Fifth Avenue, Suite 1000
Seattle, Washington 98104

Hon. Stephen Reinhardt
U.S. Circuit Judge
U.S. Courthouse
312 North Spring Street, Room 1747
Los Angeles, California 90012

All memoranda shall be double spaced and conform to the rules regarding type size applicable to printed briefs.